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**REPORTS**  
  
**OF**  
  
**CASES AT LAW AND IN CHANCERY**

ARGUED AND DETERMINED IN THE  
  
**SUPREME COURT OF ILLINOIS.**

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**VOLUME 252.**

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN DECEMBER, 1911, AND CASES WHEREIN REHEARINGS WERE DENIED AT THE DECEMBER TERM, 1911, AND FEBRUARY TERM, 1912.

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0      **SAMUEL PASHLEY IRWIN,**  
**REPORTER OF DECISIONS.**

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**BLOOMINGTON, ILL.**  
**1912.**

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DURING THE TIME OF THESE REPORTS.

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ATTORNEY GENERAL;

WILLIAM H. STEAD.

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REPORTER OF DECISIONS,

SAMUEL PASHLEY IRWIN.

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**CASES**  
ARGUED AND DETERMINED  
IN THE  
**SUPREME COURT OF ILLINOIS.**

---

THE PEOPLE *ex rel.* John E. W. Wayman, State's Attorney,  
Petitioner, *vs.* MICHAEL ZIMMER, Sheriff, Respondent.

*Opinion filed October 25, 1911—Rehearing denied Dec. 7, 1911.*

1. **HABEAS CORPUS**—*writ of habeas corpus must be confined to its legitimate purpose.* The writ of *habeas corpus* is a high prerogative writ, which, when properly issued, supersedes all other writs, and it must therefore be confined to its legitimate office, otherwise a partisan judge may, by usurpation of jurisdiction, work a great wrong to society and the State by discharging offenders lawfully convicted and sentenced to imprisonment.

2. **SAME**—*writ of habeas corpus cannot be used as a writ of error.* A writ of *habeas corpus* does not operate as a writ of error and cannot be used to review a judgment entered by a court which had jurisdiction of the person and subject matter of the suit wherein the judgment was rendered.

3. **SAME**—*when court must decline to discharge prisoner.* The jurisdiction of the court to render the judgment upon which the process under which a prisoner is held is based lies at the foundation of a *habeas corpus* proceeding to obtain his discharge, and if it appears from the petition and return in the *habeas corpus* proceeding that the court which rendered such judgment had jurisdiction of the person and subject matter, the court to which the *habeas corpus* petition is addressed should decline, for want of jurisdiction, to discharge the prisoner.

4. SAME—*when order of discharge is void.* If it appears from the petition for *habeas corpus* and the return to the writ that the court which rendered the judgment upon which the process under which the petitioner is held is based had jurisdiction of the person and subject matter, the court to which the petition is addressed has no jurisdiction to enter an order of discharge, and if it does so the order of discharge is void and should be disregarded by the officer to whom it is directed.

5. SAME—*an officer is not protected by void process.* The rule that an officer is protected by process regular on its face applies only where such process is invoked for the protection of an officer who has acted under such process without notice of its invalidity and in good faith, and does not apply where the officer has notice that such process is void and has been issued by a court which had no jurisdiction to issue the same.

ORIGINAL petition for *mandamus*.

W. H. STEAD, Attorney General, and JOHN E. W. WAYMAN, State's Attorney, (THOMAS MARSHALL, ZACH HOFHEIMER, and GEO. W. MILLER, of counsel,) for petitioner.

JOHN STELK, for respondent.

DANIEL DONAHOE, and JAMES HARTNETT, for Edward S. Gard.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an original petition filed in this court in the name of the People, upon the relation of the State's attorney of Cook county, praying for a writ of *mandamus* to compel Michael Zimmer, as sheriff of Cook county, to apprehend Edward S. Gard and deliver said Gard to the jailor of Cook county, and to imprison and hold said Gard in accordance with the terms of a certain order theretofore entered by Judge Scanlan, one of the circuit judges of Cook county, while sitting in a branch of the criminal court of said Cook county, by which order the said Gard had been adjudged guilty of a contempt of court and ordered to be confined

in the county jail of said Cook county for the period of sixty days. An answer has been filed by respondent, and the relator has interposed a general demurrer to said answer, and briefs and arguments have been filed by the relator and by the respondent. By permission of court Gard has filed a brief in this case although leave was denied him to file an answer.

The facts involved in this case are not in dispute, and are, in brief, as follows: A day or two prior to the 21st day of November, 1910, one William Schubert was arrested by the police in the city of Chicago on suspicion of having committed the crime of robbery and was confined at one of the police stations in the said city without a formal complaint having been lodged against him with a committing magistrate, while the charge against him was being investigated by the police. On the 21st day of November a writ of *habeas corpus* for the discharge of Schubert was sued out before Judge Scanlan, one of the circuit judges of the said county, who was then holding a branch of the criminal court of said county. Schubert was produced in court by Edward S. Gard, a police officer of the city of Chicago, in response to the command of the writ, who stated orally to the court that Schubert was being held by the police on the charge of robbery and asked that a hearing in the *habeas corpus* case be postponed to give the police an opportunity to have present at the hearing the prosecuting witness. Judge Scanlan fixed the amount of bail which Schubert should give pending the hearing, but which he was unable to give, and continued the case until November 23. Upon that day, on the case being again called and the prosecuting witness having failed to identify Schubert as the man who had robbed him, Gard and a representative of the State's attorney's office being present, Judge Scanlan in open court inquired of Gard if there were any other charges against Schubert or if there was any reason why he should be held further, and upon Gard informing the judge there were no other charges



against him and there was no reason why he should be further held, an order of discharge was entered by Judge Scanlan discharging Schubert, and Schubert returned with an officer to the jail. As he left the jail Gard re-arrested Schubert upon two warrants which Gard had sworn out of the municipal court of Chicago on November 22, charging him with vagrancy and with living in an open state of adultery, which warrants he had in his possession at the time Schubert was discharged by Judge Scanlan in the *habeas corpus* proceeding. The matter of the re-arrest was immediately brought to the attention of Judge Scanlan, and upon investigating the matter he caused formal proceedings for contempt of court to be instituted against Gard for falsely stating to him, at the time the *habeas corpus* proceeding was disposed of, that there were no other charges against Schubert and that there was no reason why he should not be discharged. Gard appeared in the contempt proceeding, filed a formal answer, and upon a full hearing he was adjudged guilty of contempt of court and ordered committed to the county jail of Cook county for sixty days. Thereupon a certified copy of the order was delivered to the re-lator, as sheriff of Cook county, and he arrested Gard and confined him in the jail of said Cook county. Within two hours of the entry of the contempt order by Judge Scanlan and the incarceration of Gard in the county jail, Gard was released from imprisonment in the county jail by a writ of *habeas corpus* issued by Judge Petit, one of the circuit judges of Cook county, who, upon Gard being brought before him, admitted him to bail on his own recognizance, and subsequently, on February 11, 1911, entered an order discharging said Gard from imprisonment by virtue of said contempt order.

The petition and return filed in the *habeas corpus* proceeding before Judge Petit showed, upon their face, that the contempt of which Edward S. Gard was found guilty was committed in open court and in the presence of Judge

Scanlan, and that said Gard appeared in the contempt proceeding before Judge Scanlan and filed an answer in the contempt proceeding and was fully heard and was present at the time he was adjudged guilty of contempt,—that is, that Judge Scanlan in the contempt proceeding had jurisdiction of the subject matter of the contempt and of the person of Gard at the time Gard was adjudged to be in contempt of court by Judge Scanlan and committed to the county jail.

Two questions are presented for decision upon this record: First, did Judge Petit have jurisdiction in the *habeas corpus* proceeding before him to discharge Edward S. Gard from the contempt order? And secondly, Gard having been discharged, if his discharge was wrongful, has this court, by *mandamus*, jurisdiction to direct the respondent, as sheriff, to re-arrest Gard and enforce the order in the contempt proceeding against him by imprisoning him in the county jail?

The writ of *habeas corpus* is a high prerogative writ and when properly issued supersedes all other writs, and by reason of that fact it should be confined to its legitimate office, otherwise an ignorant, reckless or partisan judge, by usurpation, may through the writ work a great wrong to society and the State by discharging offenders who have been lawfully convicted and sentenced to imprisonment by other courts while legally exercising co-ordinate jurisdiction with the court granting such discharge. It has never been the office of the writ of *habeas corpus* to operate as a writ of review, and we take it that no well considered case can be found where it has been held that the writ may properly be used to review the judgment of a court where the judgment sought to be reviewed had been rendered by a court which had jurisdiction of the person and subject matter of the suit in which the judgment had been rendered. *Ex parte Smith*, 117 Ill. 63; *People v. Allen*, 160 id. 400; *People v. Jonas*, 173 id. 316; *People v. Murphy*, 212 id.

584; *People v. Superior Court*, 234 id. 186; *People v. Strassheim*, 242 id. 359; *Martin v. District Court*, 37 Colo. 110; *Ex parte Parks*, 93 U. S. 18; *Keizo v. Henry*, 211 id. 146; *Harlan v. McGourin*, 218 id. 442.

In *Ex parte Smith*, *supra*, Smith was adjudged guilty of contempt and fined and ordered committed to jail until the fine was paid for refusing to answer questions before a grand jury. He filed a petition for *habeas corpus* in this court. The writ was denied. The court said, among other things (p. 65): "We regard the petition in this case as a mere attempt to review and set aside a judgment at law for an alleged error in the proceeding where the court clearly had jurisdiction both of the person and subject matter of the suit. This cannot be done. The petition shows that the petitioner was regularly brought before the grand jury as a witness, that he refused to answer certain questions propounded to him, and that the court thereupon imposed a fine upon him. Whether the court was authorized, under the circumstances, to impose the fine was a matter which the law authorized and empowered the court to determine, just as in any other case of alleged contempt. While, for the purposes of the argument, it may be conceded that the court erred in reaching the conclusion it did, nevertheless its right and duty to pass upon the question was clear beyond all question. If the judgment was erroneous, as is claimed, the remedy was the same as in the case of any other erroneous judgment where the right of appeal or writ of error is given. We regard the order directing the defendant to stand committed till the fine and costs were paid in the nature of final process,—a mere means of enforcing the payment of the judgment,—which would have been suspended by any order staying the judgment itself. If, as claimed, the judgment is erroneous, a writ of error was the appropriate remedy, and upon that hypothesis we must assume the reviewing tribunal would, if asked, have made the writ a *supersedeas*,

which would have suspended the order of commitment till the case could be disposed of on the merits."

In *People v. Allen, supra*, the petitioner was indicted, tried and convicted in the criminal court of Cook county. While in the penitentiary under sentence he filed an original petition for *habeas corpus* in this court. In that case this court pointed out that the criminal court had jurisdiction of the person and subject matter, and said that while there might be some question in regard to whether the judgment entered was erroneous it was not void, and therefore there was no ground for a writ of *habeas corpus*. The court said that if any error was committed by the trial court in the trial of the cause or in the sentence of the petitioner, that was a question which could be reviewed by a writ of error, but the petitioner had no right to a writ of *habeas corpus*.

In *People v. Jonas, supra*, which was an original petition for *habeas corpus* in this court, the petitioner had been fined by a justice of the peace for a violation of an act regulating the practice of medicine and surgery. A *mittimus* was issued by the justice of the peace commanding that unless the petitioner pay the amount of the fine, with costs, etc., he be committed to the common jail of Cook county, and he was taken into custody under this *mittimus*. Petitioner sought to test the constitutionality of this act in the *habeas corpus* proceeding. This court pointed out that the justice of the peace had jurisdiction to hear the case and to render judgment against the petitioner, and in doing so had full authority and jurisdiction to decide all questions involved in the case, including the constitutionality of the statute, and that situation was not changed, the court said, by the fact that the justice court was an inferior one and that its decision of a constitutional question might not be of great authority as a precedent. On page 320 the court said: "The effect of granting writs in cases of this kind would be to allow defendants, in all convictions under ordinances or statutes the validity of which might be questioned, to

come directly to this court by a proceeding in *habeas corpus* instead of appealing or prosecuting writs of error, as the law contemplates. Such a practice contravenes the statute and is not to be permitted. In this case the remedy by appeal was complete and the writ of *habeas corpus* is denied."

In *People v. Murphy, supra*, a motion for leave to file a petition for writ of *habeas corpus* was made in this court, and the particular ground for relief set forth in the petition was that the petitioner, Freeman, who was indicted for murder, had not been given a trial within four months after the time of his commitment to jail. The court, in denying the motion, pointed out that the prisoner, to invoke this statute, should demand his release in the trial court, and preserve in the record, by bill of exceptions, the proceedings had upon such application; that if the application be denied it was the right of the prisoner to have the action of the court reviewed as a part of the record when his case should be brought to this court, if at all, by writ of error, and said (p. 588): "It is not the intent or purpose of the law that mere errors committed or arising out of matters wherein a court is exercising a discretion, as in this case, during the pendency of the trial, and reviewable upon error, shall be reviewed by courts of concurrent jurisdiction, or any court for that matter, under a writ of *habeas corpus*. The writ of *habeas corpus* is not for the purpose of reviewing errors, and is only authorized in those cases where the court has acted without jurisdiction. \* \* \* The contention or view that the circuit court of Cook county is vested with jurisdiction to sit in review of the proceedings of the criminal court cannot for a moment be entertained."

In *People v. Superior Court, supra*, one Lipsey was convicted of receiving stolen property and sentenced to the penitentiary. This court reviewed the record of his conviction on writ of error, affirmed the judgment and denied a rehearing. The court's mandate issued, and he was taken to the penitentiary at Joliet to undergo imprisonment in ac-

cordance with the judgment of the criminal court of Cook county. He then filed a petition for a writ of *habeas corpus* in the superior court of Cook county and Judge McEwen ordered the writ to issue. The writ issued and was served upon the warden of the penitentiary, and he made return that he had complied with the writ by delivering the body of Lipsey into the custody of the sheriff of Cook county. The contention on behalf of Lipsey was, that the judgment of conviction was void for the reason that the verdict was insufficient to warrant a judgment of conviction, and amounted, in law, to a verdict of not guilty. An original petition for *certiorari* was filed in this court and a writ issued, in response to which Judge McEwen, on behalf of himself and the superior court, filed a return to the writ setting forth the *habeas corpus* proceedings, and it was held that, after an affirmance of a judgment of conviction by this court, all questions which could have been raised must be considered as having been raised and passed upon, and that the superior court was without jurisdiction to entertain the *habeas corpus* proceedings. In that case, the writ of *habeas corpus* was sought after there had been a review of the record by this court, but with reference to the right of one court to review the records of courts of concurrent jurisdiction where there has been no review of the record by this court, the late Justice Scott, speaking for the court, said (p. 204): "Nothing said or left unsaid is to be deemed an intimation that the superior court could rightfully have discharged Lipsey on *habeas corpus* if the criminal case had not come to this court and if the verdict was properly the subject of the criticisms leveled against it. The criminal court had jurisdiction of the offense with which Lipsey was charged and had jurisdiction of his person. It had jurisdiction to determine the sufficiency of the verdict and jurisdiction to enter the judgment which it did enter. (*Ex parte Watkins*, 3 Pet. 193.) By the entry of final judgment it adjudicated that verdict to be one which would support a



judgment of conviction in the case. The superior court is of concurrent jurisdiction, only, with the criminal court. Our view of the law with reference to the power of the superior court to discharge a prisoner on *habeas corpus* who is held pursuant to a judgment of the criminal court, which that court had the jurisdiction to enter, may be gleaned from the opinion in *People v. Murphy, supra*."

In *People v. Strassheim, supra*, an original petition for writ of *habeas corpus* was filed in this court. The contention urged was that the statute under which the petitioner was sentenced was wholly void. The right to raise that question by *habeas corpus* proceedings was denied. The court said (p. 362): "These questions which counsel seek to raise concerning the validity of the entire act cannot be raised or considered in this proceeding by *habeas corpus*, since they do not affect the jurisdiction of the criminal court, in which the relator was convicted. The courts have uniformly held, in very numerous cases, that the writ of *habeas corpus* cannot be made to perform the functions of a writ of error or an appeal, and if the relator was sentenced under the provision of a void act that question could properly be raised on a writ of error."

In the *Martin case, supra*, one Moran was tried in a district court of the State of Colorado and convicted of the crime of robbery and sentenced to the penitentiary. He filed a petition for a writ of *habeas corpus* in the district court of another judicial district of that State, and the writ was issued. The sole ground for the allowance of the writ was that the judgment under which he was sentenced was absolutely void because it was not within the power of the court to pronounce the same. He had been sentenced for a term of not more than fourteen years under an indeterminate sentence act which it was claimed did not go into force until after the commission of the robbery, and it was claimed that at the time of the commission of the robbery the penalty was confinement in the penitentiary from three

to fourteen years. The district court, before whom the *habeas corpus* proceedings were heard, discharged the prisoner, apparently for the reason relied upon by him that the judgment under which he was sentenced was absolutely void as rendered under the wrong law. The warden, Martin, filed an application in the Supreme Court of Colorado, as warden of the State penitentiary, for an original writ of *certiorari* to review the action of the district court, and of the judge thereof, in releasing Moran from the penitentiary. It was a case of one court on *habeas corpus* releasing from the penitentiary and discharging from custody a prisoner tried, convicted and sentenced by a district court of another district, both courts being of concurrent jurisdiction. The danger of this practice is well illustrated, for while the Supreme Court allowed the writ of *certiorari* and set aside the judgment of the district court discharging Moran from custody, Moran had been set at liberty under the order of the district court and had left the State. The court pointed out that even if Moran had been sentenced under the wrong statute, the judgment of the court was not void but voidable, and that in any event Moran would have to serve the minimum sentence under the statute which he claimed applied, before he could procure his liberty by *habeas corpus*, if it could then be done. It was pointed out that the sentence complained of could be corrected upon writ of error, and the court said (p. 117): "The district court, in ruling otherwise, clearly exceeded the limit of its jurisdiction in discharging the prisoner, and its judgment for that reason should be set aside. For another reason that court exceeded its jurisdiction in the premises. The sentence under which the prisoner was in custody was pronounced by the district court of Otero county. That court had jurisdiction of the crime and of the person of the defendant and the power to pronounce sentence. The district court of Arapahoe county is a court of concurrent jurisdiction, only. It has no power, under the constitution or the statutes of this State, to review

or supervise, by *habeas corpus*, the judgment of the district court of another judicial district. This was clearly intimated by Mr. Justice Elliott in his concurring opinion in *Cooper v. People*, 13 Colo. 237. He there said that, notwithstanding the fact that our statute confers jurisdiction in *habeas corpus* cases upon district courts and district judges, yet in the nature of things there must be some limitation to the exercise of such power, else the unseemly spectacle might be presented of one district court releasing prisoners committed by another district court, or even by the Supreme Court itself. This is precisely what the district court of the second judicial district has assumed to do in this case, and it was beyond its jurisdiction to do so. \* \* \* For the foregoing reasons we conclude that the district court of the second judicial district in discharging the prisoner on *habeas corpus* exceeded the limits of its jurisdiction, and proceeded in palpable violation of the provisions of the *habeas corpus* statute and the previous decisions of this court."

In *Keizo v. Henry*, *supra*, Keizo was indicted for murder by a grand jury of the Territory of Hawaii. He was found guilty and sentenced to death. The case came to the Supreme Court of the United States by a writ of error directed to a judgment of the Supreme Court of the Territory of Hawaii discharging a writ of *habeas corpus* and remanding the prisoner to the custody of the sheriff. The point urged by the prisoner was that certain members of the grand jury who returned the indictment against him were not citizens of the United States, as required by the law. There was an affirmance of the judgment of the Supreme Court of the Territory. Among other things in the opinion the court said (p. 148): "But no court may properly release a prisoner under conviction and sentence of another court unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have

been committed in the course of the proceedings cannot be corrected upon a writ of *habeas corpus*, which may not in this manner usurp the functions of a writ of error. [Citing authorities.] These well settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned if the court had jurisdiction of the cause and of the person, as the trial court had in this case. [Citing authorities.] The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. \* \* \* That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error."

In *Ex parte Parks*, *supra*, which was a *habeas corpus* proceeding where the petitioner had been convicted of the crime of forgery, it was contended that the act for which he was convicted (forgery) was not a crime under the Federal statutes, and the court held that question could not be inquired into on *habeas corpus*. The reason is manifest. The trial court having jurisdiction of the subject matter and the person, had the power to decide whether the crime of forgery could be committed under the Federal statutes, and the conviction and sentence of the prisoner was a decision by the court of that question. If erroneous, the law provided a method for its review, and the method was not by *habeas corpus*. Mr. Justice Bradley, speaking for the court, said: "But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court and within its jurisdiction. \* \* \* Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal pro-

ceedings,—on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment unless a writ of error lies to some superior court,—and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment.” Again, on page 23: “But in the case before us the district court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error and to assume an appellate power which has never been conferred upon this court.”

In *Harlan v. McGourin*, *supra*, a circuit court of the United States refused to release the petitioners upon writs of *habeas corpus*, and under the Federal statutes appeals were taken to the United States Supreme Court. It was contended that there was absolutely no evidence to sustain the conviction of the petitioners, and that upon that ground they should have been discharged, but the court, speaking through Mr. Justice Day, said (p. 448): “The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act,—not the correctness of its conclusions.”

In *In re Gregory*, 219 U. S. 210, an interesting and instructive opinion was written by Mr. Justice Hughes on behalf of all the members of the court. It was an original petition for writ of *habeas corpus* to inquire into a detention under a conviction in the police court of the District of

Columbia of engaging in a gift enterprise business within the district. The rule was discharged and the petition dismissed. Said the court: "The only question before us is whether the police court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error, and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime,—that is to say, whether the court properly applied the law,—if it be found that the court had jurisdiction to try the issues and to render the judgment." Numerous cases are then cited. The court then cites the opinion of Mr. Justice Day in *Harlan v. McGourin*, *supra*, and quotes from it with approval. Other cases are approvingly noted, including *Ex parte Parks*, *supra*. The opinion concludes thus: "In hearing this application this court does not sit to review the correctness of the conclusion of the police court as to the violation of the statute by the petitioner, or of the decision of the court of appeals of the district as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues; and as we find that the statutes conferred that jurisdiction the application for a writ of *habeas corpus* must be denied."

Section 21 of the chapter on *habeas corpus*, (Hurd's Stat. 1909, p. 1232,) contains, among other things, the following provision: "No person shall be discharged under the provisions of this act, if he is in custody, \* \* \* by virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, unless the time during which such party may be legally detained has expired." Section 22 of the same act provides: "If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes: (1) Where the court has exceeded the limit



of its jurisdiction, either as to the matter, place, sum or person; (2) where, though the original imprisonment was lawful, yet, by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge; (3) where the process is defective in some substantial form required by law; (4) where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment or arrest to issue; (5) where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; (6) where the process appears to have been obtained by false pretense or bribery; (7) where there is no general law, nor any judgment, order or decree of a court to authorize the process if in a civil suit, nor any conviction if in a criminal proceeding. No court or judge, on the return of a *habeas corpus*, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted."

It is manifest from the foregoing decisions and statute that when a petition is presented to a judge for a writ of *habeas corpus* to discharge a prisoner held under judicial process, the question of the jurisdiction of the court to render the judgment, which is the foundation of the process by which the prisoner is held, lies at the very threshold of the *habeas corpus* proceeding, and if it appears from the petition, return, or in any other legitimate manner, that the court that rendered the judgment by virtue of which the process issued from which discharge is sought had jurisdiction of the person of the prisoner and of the subject matter of the suit in which the judgment was rendered, then the judge to whom the petition is presented should decline, for lack of jurisdiction, to discharge the prisoner, as if the court that rendered the judgment upon which the process

issued by which the prisoner is held had jurisdiction of the person of the prisoner and the subject matter of the suit, then the case of the prisoner is not one for discharge upon writ of *habeas corpus* but for review by appeal or on writ of error, as no court upon *habeas corpus* can sit as a court of review to re-try cases which have been legally decided upon full jurisdiction by other courts, especially other courts of concurrent jurisdiction. In considering this question in *People v. Superior Court, supra*, on page 198 it was said: "In this case it appeared from the face of the petition for a writ of *habeas corpus* that the question thereby raised had, as a matter of law, been adjudicated against Lipsey by this court when his case was here on writ of error, and it therefore appeared from the petition that Lipsey, so far as imprisonment by virtue of that judgment was concerned, could not by the superior court, or any judge thereof, be discharged, admitted to bail or otherwise relieved, and for that reason the writ should not have issued. It is contended, however, that even if this be true the superior court was not without jurisdiction; that, having general jurisdiction in *habeas corpus*, the court had the power and authority to issue the writ even though the prisoner could not lawfully be discharged. We have held that jurisdiction is authority to hear and decide a cause, and that it does not depend upon the correctness of the decision made. (*People v. Talmadge*, 194 Ill. 67.) 'Jurisdiction of the tribunal does not depend upon actual facts alleged, but upon authority to determine the existence or non-existence of such facts and to render judgment according to its findings.' (Bailey on Jurisdiction, sec. 2.) The language last quoted seems to us to be accurate. Applying that statement of the law to this petition for *habeas corpus*, it is apparent that the petition conferred no jurisdiction upon the superior court. The fact alleged was that the judgment in the criminal case was void. It also appeared from the petition, as a matter of law, that this court, upon a writ of error, had determined that alleged

fact to be untrue and had determined that the judgment was valid. That being the case, the superior court was without authority to determine the existence or the non-existence of the alleged fact. That question had already been determined by a tribunal whose finding the superior court had no authority to review. The superior court was, therefore, without jurisdiction in the premises and without right or power to order the issuance of the writ.—*People v. Murphy*, 212 Ill. 584; *In re Williams*, 10 L. R. A. (N. S.) 1129; *Commonwealth v. Lecky*, 1 Watts, 67; *State v. Dobson*, 135 Mo. 1; *Martin v. District Court*, 37 Colo. 110; *Doyle v. Commonwealth*, 107 Pa. St. 20."

It is clear from the petition and return that Judge Scanlan had jurisdiction to commit Edward S. Gard for contempt. Those jurisdictional facts appear on the face of the petition and return. Judge Petit was without jurisdiction to enter the order of discharge, and the order of discharge being beyond his jurisdiction to enter, was absolutely void. In the *Murphy* case we thus express our view upon this subject (p. 589): "The contention or view that the circuit court of Cook county is vested with jurisdiction to sit in review of the proceedings of the criminal court can not for a moment be entertained. If the circuit court had assumed jurisdiction and granted the writ \* \* \* it would have been a nullity for lack of jurisdiction in the court and could avail the relator nothing. The order of the circuit court would neither warrant the discharge of the relator nor protect him against re-arrest. It is as essential that a court have jurisdiction in a proceeding for writ of *habeas corpus* as any other cause that may come before it."

It is clear, in view of the holding of the courts and the statute of this State, that the order of discharge of Edward S. Gard entered by Judge Petit was a usurpation of judicial power, and that the order entered by Judge Scanlan in the contempt proceedings was not annulled thereby,

but possesses to-day the same vitality it possessed upon the day upon which it was entered.

It is strenuously contended on behalf of the respondent that he was not bound to hold Edward S. Gard under the order entered by Judge Scanlan in the contempt proceedings in defiance of the subsequent order entered in the *habeas corpus* proceedings by Judge Petit, as it is said it was not his duty, as sheriff, to stop and inquire whether Judge Petit had jurisdiction to issue the order of discharge or not, but that he had the right to assume the order of discharge was a valid order and to obey it, and he has in support of this position cited a large number of authorities to the effect that an officer is protected by process regular upon its face. We have no quarrel with the authorities cited by the respondent upon that proposition. The rule therein announced, however, only applies where process regular upon its face is invoked for the protection of an officer who has acted under such process without notice of its invalidity and in good faith, and does not apply where the officer has notice that the process under which he is acting is void and has been issued by a court that is without jurisdiction to issue the same. (*Tefft v. Ashbaugh*, 13 Ill. 602; *Gorton v. Frizzell*, 20 id. 292; *Tuttle v. Wilson*, 24 id. 553.) In the *Tefft* case, *supra*, on page 603, it was said: "It appeared that Heath arrested the plaintiff by virtue of a *capias ad satisfaciendum* and placed him in the custody of the jailor. This proof showed, *prima facie*, that he was acting within the limits of his official duty. The writ protected him unless it appeared on its face that it was issued by a court having no jurisdiction of the person of the plaintiff, or unless he had notice in some other way that it was issued without authority of law." And in the *Gorton* case, *supra*, on page 295, it was said: "Being void [meaning the process] the defendant could not have justified under it in an action against him for false imprisonment. The sheriff had notice, by the recital of the affidavit

set out in the writ, that the justice of the peace had no jurisdiction or power to issue it and that he could not execute it without being a trespasser. An officer cannot justify under a void writ." In the *Tuttle case, supra*, on page 561, it was said: "The rule that a ministerial officer is protected in the execution of process issued by a court or officer having jurisdiction of the subject matter and of the process, if it be regular on its face and does not disclose a want of jurisdiction, is a rule of protection, merely, and beyond that confers no right. It is held to be personal to the officer himself and affords no shelter to the wrongdoer, under color of whose process, if it be void, the officer is called upon to act."

The order of discharge entered in the *habeas corpus* proceeding by Judge Petit was absolutely void and the petition and return in the *habeas corpus* proceeding showed it was void. The respondent would therefore have been justified in disobeying it and in holding Edward S. Gard. The respondent was, however, between two fires. The order entered by Judge Scanlan required him to hold and imprison Gard, and the order of Judge Petit required him to discharge Gard. He was therefore bound to act,—that is, obey one order and disobey the other,—and he 'was bound to act at his peril, and acting, undoubtedly, upon the best light he had, he determined to obey what subsequently proved to be the void order, and now that it has been held by this court (the court of last resort) that the order entered by Judge Petit is void, that order no longer stands in the way of the execution of the order entered by Judge Scanlan. While the order entered by Judge Petit had the effect to delay the enforcement of the law for a time, it will not have that effect longer.

The writ of *mandamus* will issue according to the prayer of the petition.

*Writ ordered.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. GRACE TRUMBLEY, Plaintiff in Error.

*Opinion filed October 25, 1911—Rehearing denied Dec. 7, 1911.*

1. CRIMINAL LAW—*indictment must allege all facts necessary to constitute the crime charged.* An indictment must allege all of the facts necessary to constitute the crime with which the defendant is charged, and an indictment which does not set forth such facts with sufficient certainty will not support a conviction.

2. SAME—*statute does not authorize the substitution of inference for allegations of fact.* Section 6 of division 11 of the Criminal Code, declaring that every indictment shall be sufficient which states the offense in the language of the statute creating the offense or so plainly that the nature of the offense may be easily understood by the jury, does not authorize the substitution of inference and inconclusive presumptions for allegations of fact.

3. SAME—*indictment must allege all the ingredients of which the offense is composed.* No indictment is sufficient if it does not clearly allege all the ingredients of which the offense is composed; and this is so even as to an exception or proviso so incorporated in the statute as to constitute a part of the definition or description of the offense.

4. SAME—*when charge against accessory must be as specific as against principal.* If an accessory is charged as principal without showing his relation to the crime according to the fact, the charge must be as full, complete and specific as a charge against one who commits the criminal act.

5. RAPE—*person under seventeen years of age cannot be convicted as accessory to crime of rape without force.* A person under the age of seventeen years cannot be convicted as accessory to the crime of rape without force, as in such case there would be no crime committed under the statute if such person were the principal actor.

6. SAME—*indictment charging two persons with crime of rape without force must allege the age of both.* An indictment charging two persons with the crime of rape without force must allege that both were of the age of seventeen years and upwards, and under an indictment which merely alleges that the one who committed the act was of the age of seventeen years and upwards, there being no allegation as to the age of the other, the latter cannot be convicted as an accessory.

7. SAME—*woman may be punished as a principal for abetting crime of rape.* Under the statute abolishing all distinction between

the principal actor and one who is an accessory before or at the fact, a woman may be punished for aiding and abetting in the commission of the crime of rape without force; but such statute does not obviate the necessity of alleging all the ingredients of her crime, including the fact that she was of such age as the statute requires to make the person perpetrating the act guilty of the crime.

CARTER, C. J., dissenting.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. ALBERT C. BARNES, Judge, presiding.

LOUIS GREENBERG, and HENRY A. BERGER, for plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and JOEL C. FITCH, (THOMAS MARSHALL, and FREDERIC BURNHAM, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

It is conceded that the second count of the indictment under which the plaintiff in error, Grace Trumbley, was convicted, in the criminal court of Cook county, of the crime of rape and sentenced to imprisonment in the penitentiary for a term of twenty years is insufficient to support the judgment, and the only disputed question is whether the first count constitutes a legal charge against her of the commission of that crime. Omitting the formal parts, the count is as follows: "That one Jerry Trumbley and one Grace Trumbley, late of the county of Cook, on the thirty-first day of August, in the year of our Lord one thousand nine hundred and nine, in the said county of Cook, in the State of Illinois aforesaid, the said Jerry Trumbley then and there being a male person of the age of seventeen years and upwards, unlawfully and feloniously did, with the consent of one May Michielson, not the wife of the said Jerry Trumbley, the said May Michielson then and there being a

female person under the age of sixteen years, to-wit, of the age of thirteen years, make an assault in and upon her, the said May Michielson, and her, the said May Michielson, then and there wickedly, unlawfully and feloniously did ravish and carnally know, contrary to the statute."

It is a fundamental rule of criminal pleading that an indictment must allege all of the facts necessary to constitute the crime with which the defendant is charged, and an indictment which does not set forth such facts with sufficient certainty will not support a conviction. Section 6 of division 11 of the Criminal Code declares that every indictment shall be sufficient which states the offense in the terms and language of the statute creating the offense or so plainly that the nature of the offense may be easily understood by the jury. This indictment does not state an offense against Grace Trumbley in the terms and language of the statute creating it, which is as follows: "Every male person of the age of seventeen years and upwards, who shall have carnal knowledge of any female person under the age of sixteen years and not his wife, either with or without her consent, shall be adjudged to be guilty of the crime of rape." So far as Grace Trumbley is concerned, it contains none of the necessary elements of the crime which were stated in *Wistrand v. People*, 213 Ill. 72. Under this statute there is no offense against the law unless the act is committed by a male of the age of seventeen years and upward and the female is under sixteen years of age and not his wife. If either of these elements is lacking no crime is established, and in *Schramm v. People*, 220 Ill. 16, it was said that the indictment then under consideration attempted to charge the statutory offense without force, and the indictment must necessarily aver the facts constituting the crime. That is merely the application of the universal rule where a statute requires the existence of a particular fact or condition to constitute a crime. No indictment is sufficient if it does not accurately and clearly allege all the ingredients of which



the offense is composed. (*United States v. Cooke*, 17 Wall. 168.) This is so even as to an exception or proviso so incorporated in the statute as to constitute a part of the definition or description of the offense. (*State v. Abbey*, 29 Vt. 60.) The necessary ingredients to constitute the crime of which the plaintiff in error was convicted are that a male person of the age of seventeen years and upwards shall have carnal knowledge of a female person under the age of sixteen years and not his wife; and accordingly it has been held that an indictment is fatally defective and charges no offense if it fails to negative the fact that the female was the wife of the defendant. *Rice v. State*, 37 Tex. Crim. App. 36; *Dudley v. State*, id. 544; *People v. Everett*, 10 Cal. App. 12; *Young v. Territory*, 58 Pac. Rep. (Okla.) 724; *Parker v. Territory*, 59 Pac. Rep. 9.

The Attorney General necessarily concedes that the indictment does not charge Grace Trumbley with the crime defined by the statute, which includes the necessary ingredients of sex, age and relationship to May Michielson, but he says that the indictment alleges all of the elements of the statutory crime against Jerry Trumbley, and, inasmuch as it also charges that Grace Trumbley, with the consent of May Michielson, a female person under the age of sixteen years, made an assault upon the said May Michielson and her, the said May Michielson, then and there wickedly, unlawfully and feloniously did ravish and carnally know, it will be presumed that Grace Trumbley was an accessory to the act of Jerry Trumbley and therefore liable to be indicted and punished as a principal. His position is, that it will be presumed from the christian name that Grace Trumbley is a female, and the charge that she committed an act which she was incapable of committing raises an inference that she must have perpetrated the crime by aiding and abetting Jerry Trumbley; but that if Grace Trumbley is a male, the indictment is good without any averment as to his age, because any boy with sufficient discretion may

with criminal intent become an accessory, regardless of his age. To adopt either theory would not only introduce a new practice in criminal law by substituting inferences and inconclusive presumptions for allegations of fact, but would lead to consequences absurd in themselves and contrary to humane sentiments and natural justice. Our statute says that an accessory is he who stands by and aids and abets or assists, or who, not being present aiding and abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime, and he who thus aids, abets, assists, advises or encourages shall be considered as principal and punished accordingly. There is no averment that Grace Trumbley is a male, but if such is the fact there is no averment of age which would make the act a crime if actually done by that defendant. If a boy under seventeen years of age commits the act charged in this indictment it is not an offense against the law and he cannot be punished for it because an essential ingredient of the crime is lacking. It would be absurd to say that a boy could be punished for aiding, abetting, assisting, advising or encouraging the commission of an act where, if he had been the principal and had committed the act himself, it would not constitute a crime. It is not a question of ability or want of ability to do the act which the statute declares to be a crime, but the question whether the act, if done, would be a crime. We cannot attribute to the General Assembly an intention to punish one as an accessory to an act which, if committed by such person, would not be a crime. "Grace" is used as the christian name of females, and if Grace Trumbley is a female under the age of seventeen years it would be quite strange if the General Assembly intended that she should be held guilty as an accessory where she would not be guilty if of the other sex. No such intention is expressed in the statute, but, on the contrary, the purpose of the statute is to protect girls under sixteen years of age against themselves, even where their acts are the

result of a vicious and depraved nature, and accordingly the law does not punish the girl for the act. It would not be in harmony with that purpose to hold that a girl under sixteen years of age would be guilty of a crime for aiding, abetting or assisting in an act which would not be a crime if actually committed by herself. In that case her position would be better if an actual participant in the act than if she merely advised or encouraged it. If, on general principles, sex ought not to lessen criminality it ought not to increase it against the manifest purpose and intention of the General Assembly in creating a crime. A male person of the age of seventeen years and upwards would be guilty of the crime, although the act was committed at the solicitation of the female, while she would be innocent of any transgression of the law, and certainly the General Assembly never intended that another girl, of like age, should become a felon by merely advising or encouraging the commission of the act.

The indictment alleges all of the elements of the statutory crime against Jerry Trumbley, but the question here is whether it shows Grace Trumbley to be guilty of a crime, and it makes no difference what allegations are made against Jerry Trumbley unless it is also sufficient to charge Grace Trumbley with the offense. The parties might be indicted separately and either one convicted if the other should never be prosecuted or even be found not guilty. It is only so far as any averments concerning Jerry Trumbley aid the charge against Grace Trumbley that such averments can be considered. It is true that Grace Trumbley, if a female, might be guilty as accessory to a crime although she was incapable of committing it, and an accessory under our statute is properly charged as a principal, but that does not obviate the necessity of charging a crime against the defendant. If an accessory is charged as principal without showing his relation to the crime according to the fact, the charge must be as full, complete and specific as a charge

against one who commits the criminal act. *Territory v. Conley*, 2 Wyo. 331.

Many authorities are cited declaring the rule that one who is incapable of committing the specific offense may, if of sufficient natural discretion, be convicted of being present and aiding and abetting another in the commission of such offense. These cases, however, afford little or no aid to the decision of this case, because they are cases where, if the necessary elements are present, the acts constitute crimes. At common law a husband might be convicted for aiding, abetting and assisting in the rape of his wife, (*Lord Audley's case*, 3 How. St. Tr. 401,) while he would not be guilty if he committed the act himself; (*Frazier v. People*, 48 Tex. Crim. 142; 13 Ann. Cas. 497;) but the reason he would not be guilty as principal is, that the wife, by entering into the marriage relation, has given her deliberate consent, which she is not permitted to retract for the purpose of charging her husband with crime. She has not given consent to the act of her husband in aiding or abetting another to commit a crime against her. Consequently there is no consent, and if the husband makes the act of the other his own by assisting in it he is guilty of the crime and our statute has not changed that rule. Undoubtedly, a woman may be punished for aiding and abetting in the commission of the crime of rape, and as our statute has abolished all distinction between the principal actor and one who is an accessory before or at the fact, the accessory is to be considered as a principal and indicted accordingly. (*Baxter v. People*, 3 Gilm. 368; *Coates v. People*, 72 Ill. 303; *Usselton v. People*, 149 id. 612; *Fixmer v. People*, 153 id. 123.) That provision of the statute, however, does not obviate the necessity of alleging all the facts constituting the crime against the one who aids, abets or assists in the commission of it. In *Baxter v. People*, which was the first case where the question was considered, the court said perhaps it would be advisable to describe the circumstances

of the case as they actually transpired, concluding as for the crime charged; and in *Fixmer v. People* it was considered proper to state the circumstances as in an indictment of an accessory at common law, provided the indictment also charged the defendant with the crime as principal. The indictment must either do that or charge the crime in the same manner as an indictment against a principal in fact. In all the cases the indictments were sufficient to state offenses against the criminal law, while the indictment in this case is insufficient to show that Grace Trumbley, whether a male or female, was a person of such age as the statute requires to make the person perpetrating the act alleged guilty of a crime, or did such acts and stood in such relation to a criminal act as made such person amenable to punishment for it. That being so, it is not sufficient to sustain the conviction.

The judgment is reversed.

*Judgment reversed.*

Mr. CHIEF JUSTICE CARTER, dissenting.

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ANN E. PYATT, Plaintiff in Error, vs. MINNIE D. RILEY  
et al. Defendants in Error.

*Opinion filed October 25, 1911—Rehearing denied Dec. 7, 1911.*

1. JUDICIAL SALES—*mistake in describing judgment in sheriff's deed is not fatal to the sale.* A mistake in the sheriff's deed in describing the amount of the judgment for which the land was sold as \$78 when the judgment was, in fact, for \$77.70, is not fatal to the sale and does not render the deed void.

2. SAME—*fact that form of attachment judgment is general is not fatal to sale.* The fact that an attachment judgment is rendered against the defendant in person and not against the land does not invalidate the sale, even though service upon the defendant, who was a non-resident, was by publication.

3. SAME—*an attachment sale is not void on collateral attack because special execution was not awarded.* The fact that the judg-

ment in an attachment suit was general in form and did not award a special execution against the land does not render the judgment and sale void on collateral attack.

4. SAME—*when error in attachment judgment does not render it void.* Error in rendering judgment in favor of a partnership for the use of the administrator of the deceased partner, who had purchased the claim after the suit had been begun in the partnership name, does not render the judgment void on collateral attack.

WRIT OF ERROR to the Circuit Court of Moultrie county; the Hon. W. G. COCHRAN, Judge, presiding.

JOHN E. JENNINGS, and F. J. THOMPSON, for plaintiff in error.

E. J. MILLER, for defendants in error.

Mr. JUSTICE HAND delivered the opinion of the court:

On January 29, 1906, one Edward C. Pyatt was the owner of a life estate in 160 acres of land in Moultrie county, which had been devised to him by his father and which was subject to an annual charge of \$500 in favor of his mother, Ann E. Pyatt. Pyatt was a non-resident of the State of Illinois, and two attachment suits were commenced against him in the circuit court of Moultrie county,—one in favor of the Plano Manufacturing Company for the sum of \$77.70, and one in favor of Spitler & Jennings for the sum of \$100. Service was had by publication, and the attachment writs issued in said suits were levied on the interest of Pyatt in said quarter section of land, the writ of the Plano Manufacturing Company being levied upon 140 acres and the writ of Spitler & Jennings being levied upon 20 acres. Afterwards judgments by default were entered against Pyatt in said attachment suits and the interest of Pyatt in said land was sold, and the purchasers at said sales subsequently assigned the certificates of sale to Ann E. Pyatt, and no redemptions having been made from said sales, Ann E. Pyatt took out sheriff's

deeds thereunder and went into possession of the premises. Afterwards, Minnie D. Riley, (formerly Minnie D. Pyatt,) who had a decree for alimony against Edward C. Pyatt, rendered by the district court of Chautauqua county, Kansas, commenced an attachment suit in Moultrie county against Pyatt based upon said foreign decree and levied upon said land as the property of Pyatt, and Ann E. Pyatt interpleaded under the statute, claiming title to said land. A trial was had, and it was determined and adjudged that the title of Ann E. Pyatt to the 140 acres derived through the Plano Manufacturing Company sale was void and that the interest of Edward C. Pyatt in that part of the 160 acres was subject to the attachment of Minnie D. Riley. It was further determined and adjudged that the title of Ann E. Pyatt to the 20 acres derived through the Spitler & Jennings sale was valid and that the Minnie D. Riley decree for alimony could not be enforced against the said 20 acres. Ann E. Pyatt has sued out this writ of error to review said judgment so far as it held that she was not the owner of the 140 acres, and has assigned as error the action of the circuit court in holding her title to the life estate of Edward C. Pyatt in said 140-acre tract was void. Minnie D. Riley has assigned cross-errors challenging the action of the circuit court in holding that the title of Ann E. Pyatt to said 20-acre tract was valid.

It is first contended the sale of the 140-acre tract to satisfy the judgment of the Plano Manufacturing Company is void because there is a variance between the judgment and the sheriff's deed, in this: that the judgment in favor of the Plano Manufacturing Company was for \$77.70 while the sheriff's deed recited a judgment for \$78,—that is, that the deed recited a judgment for thirty cents more than the judgment was rendered for. We think this objection to the title of Ann E. Pyatt to the 140 acres is without force. The amount of the judgment is recited in the sheriff's deed to identify the deed with the judgment

upon which it is based, and the fact that there is a variance of a trifling amount between the judgment and the amount of the judgment recited in the sheriff's deed will not avoid a sheriff's sale and render his deed void. (*Keith v. Keith*, 104 Ill. 397; *Holman v. Gill*, 107 id. 467.) In the *Keith case*, on page 400, it was said: "Counsel contend that there is a variance between the decree in evidence and the recitals in the sheriff's deed; that the decree is of the October term, 1872, of the Union circuit court, for 'the sum of \$100 during each and every year, commencing on the first day of November, A. D. 1872, payable quarterly, in advance,' while the sheriff's deed recites that 'at the October term, A. D. 1872, of the circuit court in and for the county of Union and State of Illinois, Ada C. Keith recovered a judgment against Bowen Keith for the sum of \$175 and costs of suit,' etc. We have held that this is a mere question of identity, and that a mis-recital of the judgment and execution in a sheriff's deed, where they are so described that they may be fully identified, is not fatal. [Citing authorities.] There seems here to have been no trouble in identifying the decree with the recitals in the deed. The word 'judgment' instead of 'decree' was purely a clerical error, and, under all the circumstances, could have misled no one, and the amount for which the execution was issued was the correct amount then due on the decree. The objection is not tenable." In the *Holman case*, on page 476, it was said: "The amount of the judgment, which is usually recited in a sheriff's deed, is but one of the numerous means by which its execution is traceable to the proper source. It is sufficient in all cases if enough appears to clearly and unmistakably show that the deed is made by the officer in his official capacity and in consummation of the legal proceedings upon which it is founded, with such reference to the proceedings themselves as they may be readily found and identified." And the general rule on the subject is thus stated, (17 Cyc. p. 1344):



"The general rule being, that the recital in a sheriff's deed is not a necessary part thereof, and if the deed mis-recites or omits to recite the judgment or execution under which the sale was made, or the sale and proceedings had thereunder, the deed is not invalidated by reason of such omission or mis-recital."

It is next objected (which objection applies to both sales) that the judgments rendered against Edward C. Pyatt are void for the reason that they are general in form and are against Pyatt, when, it is said, they should have been special in form and rendered against the land levied upon, and not against Edward C. Pyatt, as no personal service was had upon Pyatt. It is true, in a limited sense, that an attachment suit is a proceeding *in rem* and not *in personam*. It is not, however, a suit *in rem* against the attached property in the same sense as in admiralty the suit is against a ship sought to be forfeited. A judgment in attachment is in form against the person of the defendant but is to be satisfied only by a sale of the property attached. In *Young v. Campbell*, 5 Gilm. 80, Mr. Justice Caton, on page 83 of the opinion, said: "The form of the judgment is the same in an attachment suit as in any other,—and that, too, whether there be a personal service or not; but where there is not such service the award should be only of a special execution." The judgments were in proper form.

It is further contended that the Plano Manufacturing Company judgment is void because it does not award special execution. In *Miere v. Brush*, 3 Scam. 21, in which the judgment was general in form and failed to award special execution, the judgment was held to be valid. On page 24 of the opinion it was said: "The plaintiff is entitled to the usual judgment, which is general, for his whole debt, as in cases commenced in the ordinary way. The execution which issues on the judgment is special, being against the property attached, only, and this is directory to the clerk. Should he issue a general execution in such

case, it would be irregular and could be stayed by a judge's order or by injunction. \* \* \* In attachment cases the judgment for the plaintiff is general against the defendant, but the execution is special against the property attached, although for greater certainty and to avoid errors it would be well for the clerk, in such cases, to make the entry of the award of a special execution, and this is the practice generally."

In the Spitler & Jennings suit it was conceded the suit was regularly commenced. Afterwards the firm of Spitler & Jennings was dissolved and Spitler took the claim against Edward C. Pyatt, and the pleadings were amended so that the case stood on the docket in the name of Spitler & Jennings as plaintiff, for the use of Spitler. Spitler died before judgment, and his administrator was substituted as usee and judgment was rendered in the name of Spitler & Jennings for his use, and it is now urged that the judgment, having been rendered in the name of Spitler & Jennings for the use of the administrator, instead of in the name of Jennings, as surviving partner, for the use of the administrator, is void, and hence there is no valid judgment upon which to base the sale of the 20 acres. While it was error to render a judgment in favor of Spitler & Jennings, Spitler having died, the judgment in that form was not void but voidable, only. (*Claffin v. Dunne*, 129 Ill. 241.) In *Black on Judgments* (vol. 1, 2d ed. p. 204,) it is said: "It may also happen that the plaintiff dies during the pendency of the suit and before verdict. In this case, supposing the cause of action to be one which survives, the regular practice is to revive the action in favor of his personal representatives. But if this is omitted and the suit proceeds to judgment in the name of the decedent, it is more reasonable to hold it voidable, only, than to consider it entirely null, for the case cannot be distinguished, in principle, from that of a defendant dying while the action is pending, where, as already shown, (sec. 200,)

the great preponderance of authority sustains the rule that the judgment is at least impervious to collateral attack and must be vacated or reversed by proper proceeding." The attack upon these attachment judgments by Minnie D. Riley is collateral and not direct.

In *Hogue v. Corbit*, 156 Ill. 540, in an action of ejectment, a sale of real estate in attachment proceedings was attacked on the ground the affidavit and writ were void. The court, speaking through Mr. Justice Baker, (p. 544,) said: "The affidavit for attachment was very manifestly defective and not in conformity with the requirements of the Attachment act. \* \* \* The validity of the writ depended upon the validity of the affidavit, and the affidavit, it being amendable, was voidable, merely, and not void. (*Bassett v. Bratton*, 86 Ill. 152.) The affidavit, the writ and the levy of that writ gave the court jurisdiction over the subject matter of the attachment. A thing that is voidable has force and effect, but in consequence of some inherent quality or defect it is liable, upon proper steps being taken, to be legally annulled or avoided, but the steps to avoid it must be taken by the proper party and by means of a direct attack upon it. Here, *Hogue*, the appellant, was a stranger to the attachment suit, to the affidavit and the writ that was levied, and to the judgment that the court, with full jurisdiction of both the subject matter and the parties to the litigation, afterwards rendered, and he can not in this collateral action call in question and impeach this writ and affidavit, which are not null and void but endowed with force and vitality. (See *Durham v. Heaton*, 28 Ill. 264, and authorities there cited.) In the case just named, this court said that acts done under erroneous or voidable process are binding, and cannot be successfully assailed except by a direct proceeding."

The judgment of the circuit court finding the title to the 20 acres in Ann E. Pyatt is correct. The cross-errors are not, therefore, well assigned. The judgment of the

circuit court finding that the title to the 140 acres was not in Ann E. Pyatt is wrong.

The judgment of the circuit court, in so far as it finds against Ann E. Pyatt as to the 140 acres, will be reversed and the cause remanded to that court for a new trial.

*Reversed and remanded.*

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JOHN H. LADD, Appellee, *vs.* ERNEST C. LADD *et al.*  
Appellants.

*Opinion filed October 25, 1911—Rehearing denied Dec. 7, 1911.*

1. PLEADING—*where the statute requires certain matters to be pleaded other matters need not be pleaded.* Where a statute, by express enactment, provides what matters shall be pleaded other matters need not be pleaded.

2. SAME—*declaration in ejectment need not specify the character of the fee claimed.* While the statute requires a declaration in ejectment to specify whether the plaintiff claims in fee, or for his own life or the life of another, or for a term of years, it does not require that the particular character of the fee claimed be specified. (*Schumann v. Sprague*, 189 Ill. 425, explained.)

3. EJECTMENT—*a mortgagee may recover under a declaration claiming the fee.* A plaintiff in ejectment may recover under a declaration claiming the fee, which he supports by proof of a warranty deed absolute in form, notwithstanding the deed was taken in his name to secure a debt which is due and has not been paid.

4. SAME—*proof that a deed was intended as a mortgage cannot be offered in defense.* Proof that a deed was made to secure a debt cannot be offered as a defense in ejectment, but the defendant's remedy in such case is in equity to enjoin the prosecution of the ejectment suit and show the true character of the instrument. (*Finlon v. Clark*, 118 Ill. 32, approved.)

5. SAME—*effect where court of equity has declared deed to be a mortgage.* After a deed has been declared by a court of equity to be a mortgage, the records of the chancery suit may be introduced to show that fact in an ejectment proceeding.

6. MORTGAGES—*as against the mortgagor the mortgagee owns the fee.* The mortgagee, as against the mortgagor, is the owner

of the fee and entitled to all the rights and remedies which the law gives to such owner.

7. RES JUDICATA—*when a decree finding deed to be a mortgage does not bar recovery in ejectment.* A decree enjoining the prosecution of an ejectment suit for ninety days upon the ground that the plaintiff's deed was intended as a mortgage, and that the defendants should be allowed ninety days in which to pay the amount due, is no bar to recovery in the ejectment suit after the ninety days have expired, there being no proof that the money has been paid, as required by the decree.

APPEAL from the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding.

STURTZ & EWAN, and WILSON & CUMMINGS, for appellants.

ANDERSON & ANDREWS, for appellee.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is a suit in ejectment brought in the circuit court of Henry county by appellee, against appellants, for the possession of two lots and the residence thereon, situated in the city of Kewanee, in said county. The trial court entered judgment in favor of appellee. This appeal followed.

This suit was filed to the November term, 1909, of said circuit court. At the same term appellants filed a bill in chancery to have the deed under which appellee claimed the premises declared a mortgage and the prosecution of the ejectment suit enjoined. It appears that April 1, 1906, appellants entered into a written agreement with Lay & Lyman whereby the latter agreed to convey the two lots in question to appellants upon payment of \$2900; that appellants paid some \$272 on the contract, and on September 6, 1906, entered into a verbal agreement with appellee (their uncle) whereby he agreed to pay the balance on said contract for the lots and advance money for building a house, provided

that the property was conveyed to him by warranty deed as security for the loan. In pursuance of this agreement appellee paid the balance due on the lots and advanced about \$7349 more for the building of the house on them, and the warranty deed of the two lots was made to him by Lay & Lyman. When the house was completed appellants moved in and occupied it as their residence. They agreed to pay back the amount so advanced in monthly payments, which they claimed were to be at the rate of \$50 a month, while appellee's testimony tended to show that the rate was \$75 a month. Appellants also claim that they paid certain sums of money for labor and material on the house, which should be credited to them. The circuit court, after a hearing on the bill in chancery, enjoined the prosecution of the ejectment suit until ninety days from the date of its decree, and declared that the deed in question was a mortgage given to secure the indebtedness, and that there was due appellee from appellants, under said deed, (so held to be a mortgage,) \$12,410.08, which should be paid within ninety days, with five per cent interest; that in default of such payment the master in chancery should sell the premises for the satisfaction of the debt, as is usual in foreclosures of mortgages. This decree was entered on November 22, 1910. Appeal was prayed from it by both parties but neither appeal was perfected. After the expiration of the ninety days a hearing was had on this ejectment suit and judgment for possession of the premises rendered in favor of appellee.

The declaration in the ejectment suit alleged that appellee claimed the property in fee. Plea of general issue was filed by appellants, jury waived and the case heard by the court. The appellee offered the warranty deed from Lay & Lyman to show title in himself. Appellants offered the bill in chancery, answer and decree. Appellants thereupon moved to strike out all of appellee's evidence on the ground of variance between the declaration and the proof. This motion was overruled and exception taken. Appellants in-

sist that the court erred in this ruling. They argue that the appellee alleged in his declaration a title in fee simple, whereas the proof introduced showed that his title was that of a mortgagee, only, which gave him a qualified, base or determinable fee.

This court has stated in several decisions that the title of a mortgagee in fee in courts of law is regarded in the nature of a base or determinable fee. (*Barrett v. Hinckley*, 124 Ill. 32; *Lightcap v. Bradley*, 186 id. 510; *Ware v. Schintz*, 190 id. 189; *McFall v. Kirkpatrick*, 236 id. 281; *Kales on Future Interests*, sec. 18.) While the mortgagor is the legal owner of the mortgaged premises against all persons except the mortgagee, (*Seaman v. Bisbee*, 163 Ill. 91,) the mortgagee, as against the mortgagor, is held in this State, as under the common law, to be the owner of the fee, entitled to all the rights and remedies which the law gives to such owner. (*Oldham v. Pfleger*, 84 Ill. 102; *Esker v. Heffernan*, 159 id. 38; *Bradley v. Lightcap*, 195 U. S. 1.) It has never been intimated in any case in this State except *Schumann v. Sprague*, 189 Ill. 425, that the particular kind of fee should be alleged in the declaration in an ejectment suit. The statement in that case relied upon by appellants, to the effect that under a declaration claiming a fee simple title the mortgagee could not recover, was unnecessary for the decision of the case, as it had already been held in the opinion that the Statute of Limitations had run as to the debt as well as to the mortgage. Section 13 of the chapter on ejectment (Hurd's Stat. 1909, p. 945,) provides that in all ejectment suits the plaintiff shall state whether he claims in fee, or for his own life or for the life of another, or for a term of years, specifying such life or the duration of such term. Section 30 of that act provides for like specifications in the verdict, if in favor of the plaintiff. The fact that said section 13 provides that the declaration shall show the character of the estate if for life or for years but does not provide that it

shall show the character if a fee, furnishes a very strong argument that the legislature did not intend to require the particular kind of fee to be set out in the declaration. The reasoning of this court in *Almond v. Bonnell*, 76 Ill. 536, supports this conclusion. (See, also, Warvelle on Ejectment, sec. 184.) When the statute by express enactment provides what matters shall be pleaded, other matters need not be pleaded. (*Hankins v. People*, 106 Ill. 628; *Sheldon v. VanVleck*, 106 id. 45.) The declaration sets forth that the plaintiff "claims in fee." Under a fair construction of the statute, and by the great weight of authority, the court did not err in holding that there was no variance between the proof and the declaration.

Appellants further argue that the decree in the chancery suit is *res judicata* as to the character of the title held by appellee. Conceding this to be true, it does not follow that the trial court was in error in finding for appellee. It has frequently been stated that ejectment is an action at law and that only legal titles and rights are considered and adjusted; that if a party has equities he should resort to a court of equity for their assertion. (*Aholtz v. Zellar*, 88 Ill. 24; *Esker v. Heffernan*, *supra*; Warvelle on Ejectment, sec. 262.) It has also been held that proof that a deed was made to secure a debt could not be offered as a defense in ejectment; that the remedy is by a bill in equity to enjoin the ejectment suit and to show the true character of the instrument. (*Finlon v. Clark*, 118 Ill. 32; *McGinnis v. Fernandes*, 126 id. 228.) Counsel for appellants attempt to distinguish *Finlon v. Clark*, *supra*, from this case on the ground that there was no proof in that case that the deed was a mortgage. It was so held in *Clark v. Finlon*, 90 Ill. 245, and courts will judicially take notice of their own records. (*Taylor v. Adams*, 115 Ill. 570.) The doctrine of *Finlon v. Clark*, *supra*, has always been quoted by this court with approval. (*Barrett v. Hinckley*, *supra*; *German Ins. Co. v. Gibe*, 162 Ill. 251; *Waughop v. Bart-*



lett, 165 id. 124; *Esker v. Heffernan*, *supra*.) After a deed has been declared by a court of equity to be a mortgage the records of the chancery suit can be introduced in an ejectment proceeding to show that fact. In the early decisions in this State there are expressions indicating that an action of ejectment could be instituted by the mortgagee against the mortgagor before as well as after default, unless it was agreed or provided in the mortgage that the mortgagor should retain possession until default in payment. It is, however, now settled that the mortgagee can only bring ejectment against the mortgagor after condition broken. (*Kransz v. Uedelhofen*, 193 Ill. 477; 1 Jones on Mortgages,—6th ed.—sec. 27.) Not only can the fact that the mortgage debt has been satisfied or barred by the Statute of Limitations be shown in an ejectment suit under the general issue, (*Schumann v. Sprague*, *supra*; *McMillan v. McCormick*, 117 Ill. 79; *Pollock v. Maison*, 41 id. 516; 1 Jones on Mortgages,—6th ed.—sec. 719;) but the court will admit thereunder proof of the fact that there has been no default in payment. (*Finlon v. Clark*, *supra*; *Kransz v. Uedelhofen*, *supra*.) The burden of proof is upon the mortgagor to show that there is no breach of condition. (Kales on Future Interests, sec. 15.) The decree in the chancery suit showed that the chancellor did not intend to enjoin the prosecution of the ejectment suit beyond ninety days from the date of the entry of the decree. It proved also that appellants were in default. In this case, as in *Finlon v. Clark*, *supra*, appellants did not attempt to prove that the debt secured was not due, or that the same had been paid, or that the requirements of the decree in chancery had been carried out by them. It necessarily follows that on this record appellee was entitled to recover in the ejectment suit.

The judgment of the circuit court must therefore be affirmed.

*Judgment affirmed.*

CHARLES J. POOLE, Defendant in Error, vs. JOHN A. KOONS, Plaintiff in Error.

*Opinion filed October 25, 1911—Rehearing denied Dec. 7, 1911.*

1. SPECIFIC PERFORMANCE—*court may decree specific performance of contract to convey land in foreign State.* A court of equity, which has acquired jurisdiction of all the parties to a contract for the sale of land situated in a foreign State, may decree specific performance by directing the defendant to execute the deed, and it may also direct the execution of a deed by the master in chancery in case the defendant fails or refuses to comply with the decree. (*Bevans v. Murray*, 251 Ill. 603, followed.)

2. PARTNERSHIP—*when a partner should not be held to account for mistake of judgment.* Where a real estate partnership agreement provides that the partners shall share equally in the profits of any sale "made by one or both parties," each partner has authority to make sales, and if there is no fraud or bad faith by one partner in making a sale he is only required to account to the other partner for one-half the actual profit, even though he may have made a mistake in judgment by selling the land too low.

3. SAME—*partners should bring forward all claims at time of a settlement agreement.* Each partner, at the time a settlement agreement is made, should bring forward all claims which he has against the other with reference to the partnership transaction and which are then due.

WRIT OF ERROR to the Circuit Court of Jefferson county; the Hon. WILLIAM H. GREEN, Judge, presiding.

WILLIAM T. PACE, and G. GALE GILBERT, for plaintiff in error.

D. G. THOMPSON, for defendant in error.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Charles J. Poole filed a bill for the specific performance of a contract for the sale of real estate and Koons filed a cross-bill to enforce payment of the consideration. The court below dismissed the cross-bill, found the amount due Koons and decreed the execution of a deed upon the pay-

ment of the amount so found due, and in default of such conveyance the master in chancery of Jefferson county was ordered to make the deed. Koons has sued out a writ of error from this court, and the record is here, as a return to said writ, for our review.

There is a substantial agreement between the parties upon the question as to the right of defendant in error to a conveyance of the premises involved, but the principal controversy is in respect to the amount that is due plaintiff in error upon the contract sought to be enforced.

The evidence shows the following facts: On the first day of November, 1908, plaintiff in error was the owner of 760 acres of land located in Craighead county, in the State of Arkansas. He had purchased 640 acres of this land in March, 1908, for which he paid \$6400, and in May of that year he paid \$600 for the remaining 120 acres. On said first day of November, 1908, the parties hereto entered into a written contract, by which plaintiff in error agreed to assign, transfer and convey a one-half interest in the said 760 acres of land in consideration of a note signed by defendant in error for \$3500, bearing seven per cent interest, and seven per cent interest on one-half of the original cost of the land from the date of the purchase by plaintiff in error to the date of the sale to defendant in error. Said contract provided that the parties should share equally in the profits and expenses which might accrue from their ownership and disposition of said lands, and it was further stipulated that said parties enter into a partnership for the purpose of dealing in real estate and each to share equally in the profits in any sale made by one or both parties. The interest then due was paid and a note for \$3500 was executed and delivered to plaintiff in error at the time the contract was executed. Defendant in error was a practicing physician, residing with his family and practicing his profession in the city of Mt. Vernon, Illinois. Plaintiff in error was a widower, and resided in Jonesboro, Craighead county, Ar-

kansas, where he carried on a mercantile business and dealt in real estate. Plaintiff in error had formerly resided in Mt. Vernon, Illinois, where he still owned some real estate. There is some evidence tending to show that at the time the contract of November 1, 1908, was entered into, it was understood or agreed between the parties that defendant in error would move his family to Jonesboro, Arkansas, and allow plaintiff in error to make his home with defendant in error and make no charge for his board. There is also some claim on the part of plaintiff in error that defendant in error agreed to give up the practice of medicine and devote his time to the real estate business, but there is nothing in the written contract referring to these matters and the evidence of plaintiff in error on these points is contradicted by that of defendant in error, so that in the disposition of the case these contentions cannot be regarded as established by the evidence. After the contract in question was made the plaintiff in error bought another tract of land in Arkansas of 160 acres, for which he paid \$600 and took the title in his own name. Defendant in error afterwards executed and delivered to plaintiff in error another promissory note for \$300, representing one-half of the purchase price of the 160 acres bought after the contract was entered into. The evidence shows that plaintiff in error requested defendant in error to sell for him certain real estate which plaintiff in error owned in Jefferson county, Illinois, and that defendant in error did interest himself in trying to find purchasers for the Jefferson county real estate and succeeded in finding a purchaser for some of the property. After the partnership agreement was made plaintiff in error sold the 120 acres purchased in May, 1908, for \$1200 in cash, and he has not accounted to defendant in error for his half of the proceeds of that sale. One of the controverted questions between the parties grows out of the sale by plaintiff in error of this 120-acre tract of land. Defendant in error claims that this 120 acres of land was worth much more

than the price for which it was sold by plaintiff in error, and that in a settlement between the parties plaintiff in error should account for one-half of the value of the land without regard to the price for which it was sold. Plaintiff in error contends that in making this sale he acted in good faith and for the best interest of both parties as he believed, and obtained a fair, reasonable price for the land, and that he should therefore only be required to account to defendant in error for one-half of the proceeds actually received by him for the land. The trial court decided this point against plaintiff in error and by the decree required plaintiff in error to account for the proceeds of this sale on the basis of a valuation of \$22.50 per acre. In other words, the court below charged plaintiff in error, on account of the sale of this 120 acres, with \$1500 more than the land sold for. The court found that one-half of this valuation, or \$1350, should have been credited on defendant in error's note as of the date when the sale was made, and in arriving at the balance due the plaintiff in error he was charged interest on this amount from December 1, 1909, at the rate of seven per cent, the total amount of interest being \$89.25, which added to the one-half valuation of the land gave defendant in error a credit of \$1439.25. The court also allowed defendant in error for commissions on certain sales made of plaintiff in error's Jefferson county real estate, \$83.35, upon which interest was also computed at the rate of seven per cent from the date said sales were made, amounting to \$7.94, making a total of commissions and interest thereon of \$91.29, which added to the \$1439.25 made a total of credits of \$1530.54, which deducted from \$4082.29, being the amount of the two notes held by plaintiff in error, left a balance of \$2551.75, which the court found was the correct amount due plaintiff in error, upon the payment of which a conveyance was directed to be made to defendant in error. The evidence also shows that on July 1, 1909, the parties to this suit had an accounting

and settlement of all matters then unsettled between them; that this settlement was made in writing and written by defendant in error and signed by both parties. By the settlement defendant in error was charged with interest then due on his two notes, amounting to \$340.50, for taxes paid by plaintiff in error \$11.50, and expenses incurred in purchase of land \$18, making a total of \$370. Defendant in error was credited with a commission of \$16.65 on the Walker trade and \$66.65 on the Watkins deal, \$190 for three mules, and for cash paid \$181,—a total of \$454.30. Defendant in error received a credit on the principal of his indebtedness to plaintiff in error of \$84.24, which balanced his account. It is not contended by defendant in error that he made any further sales or had any other transactions or dealings with plaintiff in error after this settlement was made. Defendant in error, however, contends that he was entitled to \$33.35 additional compensation on the Watkins deal, and that he was also entitled to \$50 commission on the Culli and McAtee sale. The court below allowed defendant in error to go behind the settlement, and allowed his claims, as above stated, for additional commission on the Watkins deal and the \$50 claimed on the Culli and McAtee trade. Plaintiff in error complains of the ruling of the court in this regard. Plaintiff in error also contends that the circuit court had no jurisdiction to decree the specific performance of this contract in any event, because the lands involved were located in a foreign State.

The contention of plaintiff in error in regard to the power of a court of chancery in this State to decree the specific performance of a contract relating to the sale of real estate in a foreign State, where the court has jurisdiction of all the parties to the contract, has had the consideration of this court at the present term in the case of *Bevans v. Murray*, 251 Ill. 603, and that question is there determined contrary to the contention of plaintiff in error.

That authority disposes of this contention in all respects, except in the case at bar the court decreed that in case the plaintiff in error neglected or refused to execute the deed, on payment of the balance due, within a specified time, the master in chancery should execute a conveyance. Plaintiff in error insists that while the court had the power to require plaintiff in error to execute the deed, it had no power to order the master in chancery to do so. We see no reason for this distinction. The alternative order requiring the master to execute the deed was only in furtherance of the relief sought, and insured the execution of the decree whether plaintiff in error was willing to carry out the order of the court or not.

We are of the opinion that plaintiff in error's position as to the amount allowed defendant in error as credits upon his notes should be sustained. The partnership agreement between the parties contains the following clause: "Party of the first part and second part on this date enter into an equal partnership for the purpose of real estate dealing, and agree to share equally in the profits of any sale or trade made by one or both parties." Aside from the general agency which each partner has, by implication of law, to represent and bind the partnership by contracts within the scope of the partnership business, the clause above quoted from the agreement clearly recognizes the right and authority of each partner to sell real estate belonging to the co-partnership. Plaintiff in error in the sale of 120 acres of partnership land was clearly acting within the implied powers given him under the law as well as those expressed in the written contract. The sale being within his power and he having the right to exercise his judgment and discretion as to the sale and the price at which it was to be made, it would be highly inequitable to hold him responsible for a mistake in judgment as to the value of the property sold, in the absence of any proof tending to show that he acted fraudulently or in bad faith

with his partner. There is no evidence whatever which in any degree tends to show that plaintiff in error did not act in good faith and with entire fidelity to what he believed to be the best interest of both parties in making this sale. If he did so act he should only be required to account for the proceeds of the sale actually received. Much evidence was heard by the court below as to the actual value of this 120 acres of land. This testimony is conflicting. The land is low, level hard-pan, which is said to be well adapted to the growth of rice but is entirely worthless for any other purpose. The evidence shows that rice culture in that locality has only recently been attempted, and that it is still so far in the experimental state that no fixed value can be placed upon land in view of its supposed adaptability to the growth of that product. The estimates of the various witnesses upon the value of this land were influenced by their faith or want of faith in the ultimate success of rice culture in that locality rather than upon a knowledge of actual sales of similar lands. The highest value placed on this land by any witness is \$30 per acre, and this figure was only named by defendant in error. Other witnesses residing in Jefferson county, Illinois, whose knowledge was limited to such as was acquired by a brief sojourn of two or three days in Arkansas, during which time they hunted quails on lands adjoining the tract in question, fixed the value at \$20 to \$25 per acre. Witnesses for plaintiff in error fixed the value at from \$5 to \$12 per acre. Plaintiff in error himself testifies that \$10 an acre (the price at which he sold the land) was a fair cash value, and he is corroborated in this statement by the testimony of other witnesses. While we do not regard the question now under consideration as open for determination by the preponderance of the testimony as to actual value, still, if it were to be thus determined, we are impressed that the preponderance of the reliable testimony is contrary to the conclusion reached by the court below. In our opinion the



plaintiff in error should only be required to account for one-half of the purchase money received for the sale of this land.

We are also of the opinion that the court erred in charging plaintiff in error with the additional commissions on the sale of Jefferson county real estate. So far as the item of \$33.35 commission on the Watkins sale is concerned, the commission on that sale was included in the settlement. Defendant in error contends that the commission on that sale was to be \$100. Plaintiff in error denies this and testifies that it was to be only \$66.65. Plaintiff in error is corroborated by the settlement agreement. If the commission on this sale was to be \$100, defendant in error should have claimed that amount when he made his settlement.

The item of \$50 claimed by defendant in error as commission on the Culli and McAtee deal should not have been allowed, for the reason that this item was due, if at all, at the time the settlement was made. Plaintiff in error testifies that he did not owe this amount, or any other amount, on account of that deal, and defendant in error admits in his testimony that at the time the settlement was made he did not intend to charge any commission for what he did in connection with the Culli and McAtee deal. The evidence convinces us that this item is not a valid claim and that it was an afterthought, brought into the account to reduce the amount defendant in error owes on his notes.

For the errors above pointed out, the decree of the circuit court of Jefferson county is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

ADELE L. SHREVE HARVEY, Appellant, vs. BLAND BALLARD  
*et al.* Appellees.

*Opinion filed October 25, 1911—Rehearing denied Dec. 7, 1911.*

1. WILLS—rule in *Shelley's case* does not apply unless both estates are of some quality. The rule in *Shelley's case* does not apply unless the freehold estate limited to the ancestor and the remainder to the heirs are of the same quality,—that is, both legal or both equitable estates.

2. SAME—duties of trustee are controlling as to quantity of estate which he takes. Where there is a devise, in terms, to a trustee, either with words of inheritance or (under section 13 of the Conveyance act) without such words, the devise is *prima facie* of a fee unless limited or restrained by other provisions of the will, and to determine whether the estate so devised is restrained or limited the nature of the trust and duties of the trustee are to be considered and are always controlling as to the quantity of estate which the trustee takes.

3. SAME—a trustee takes such an estate as the purposes of the trust require. If a trustee is required to collect and pay the rents of property for a definite period he will take an estate for years; if he is charged with such duties for the life of an individual he will take an estate for the life of such person, and if his duties are of indefinite duration he will take the fee.

4. SAME—it is not necessary that there be a formal devise to the trustee. It is not necessary that there be a formal devise to the trustee, but he will acquire an estate commensurate with the powers conferred and the purposes to be accomplished.

5. SAME—when trustee takes legal estate for life of life tenant. Where a will directs that the property be divided and that one-half of each share be set apart and conveyed to a trustee, to be held for the use and benefit of each child during his or her life and then to descend to his or her heirs, and requires the trustee, after paying the taxes and insurance and keeping the property in repair, to pay the rent to each child in person, quarterly, there being no further duties required, the trustee, when the conveyance to him is made, takes a legal estate for the life of the child, in trust for her for life, and a legal remainder passes under the will to those persons who answer the description of her heirs at her death.

6. SAME—word “descend,” used in will, may mean to pass under the will. While the technical meaning of the word “descend” is to pass by inheritance by operation of law, yet it may be used in a will as meaning that the title shall pass by virtue of the will

in the manner in which property descends without any conveyance, and as distinguished from a conveyance by grant.

7. SAME—*construction of will cannot be made to depend upon subsequent facts.* The construction of a will cannot be made to depend upon subsequent facts or conditions arising many years after the will took effect, and the mere fact that it would have been better to have authorized a trustee to make long-term leases beyond the period of the active trust or to mortgage the property for making improvements, which would require the trustee to take the fee, does not warrant construing the will to that effect, where there is nothing to indicate such an intention.

8. SAME—*what does not show an intention to vest trustee with fee.* An expression in a will to the effect that the testator desired that the one-half of each child's share which was to be set apart and conveyed to a trustee should be income-paying real estate, and that he believed such half would give each child a comfortable living if unfortunate in business, or otherwise, does not show an intention to give the trustee power to provide for a continuous income by making long-term leases or mortgaging the land, which would require him to hold the fee.

APPEAL from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

HERRICK, ALLEN & MARTIN, and HERBERT POPE, for appellant.

ALBERT M. KALES, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On August 22, 1910, the appellant, Adele L. Shreve Harvey, whose name was then Adele L. Shreve Ballard, and who was the widow of Bland Ballard, deceased, but has since been married to Paul Harvey, filed her petition under the Burnt Records act in the circuit court of Cook county against her children, Bland Ballard, Shreve Ballard and Belle Sheridan Ballard, and others, who are appellees, alleging that she was the equitable owner in fee simple of a lot in Chicago by virtue of the last will and testament

of her father, Thomas T. Shreve, of the city of Louisville, in the State of Kentucky, the legal title to which lot had been conveyed to her late husband, Bland Ballard, as trustee under said will, and had descended to said children as his heirs-at-law. Appellant claimed that by paragraph 12 of said will the testator devised to her an equitable life estate and limited an equitable remainder in fee simple to her heirs, so that by the operation of the rule in *Shelley's case* she derived an equitable estate in fee simple, and was entitled to receive from her said children, as heirs-at-law of Bland Ballard, deceased, a conveyance of the legal title to the lot. Her prayer was that the court establish and confirm her equitable title in fee simple absolute and decree that the legal title to the lot be by proper deed or deeds conveyed to her. Two of the children were infants, and Albert M. Kales, an attorney of this court, was appointed their guardian *ad litem*. Answers and replications having been filed, the cause was referred to a master in chancery, who took and reported to the chancellor the evidence, with his conclusion, in accordance with the allegations and prayer of the petition. The chancellor heard the cause on exceptions to the master's report, sustained the exceptions, and dismissed the petition for want of equity at the cost of the appellant. This appeal followed.

The will of Thomas T. Shreve was made and signed on March 1, 1867, and he died November 5, 1869. After making specific bequests he directed a division of the residue of his estate into five equal parts. He then gave two-fifths to two of his children, (one-fifth to each,) and the remaining three-fifths he willed to his wife and her three children, Mattie Belle, Thomas William and Adele Lawrence Shreve, the appellant, one-fourth to each, subject to the conditions and restrictions named in the will. Paragraph 12, under which the appellant claims the fee simple title, is as follows: "As soon after my death as it can be conveniently done, I wish my executor hereinafter named,

after first setting apart a fund sufficient to pay the above named special devises and incidental expenses, to make out a full and complete list and schedule of all my estate, of every character and description, real, personal and mixed, in the State of Kentucky and elsewhere, and hand the same to the following named persons, to-wit: James W. Henning, A. C. Badger and A. Harris, who, or any two of whom, I desire to proceed to value it and divide it into five equal shares upon the principles hereinbefore indicated. One-half of each share (which half I wish to be income-paying real estate) I desire to be set apart and conveyed to a trustee, to be held for the use and benefit of each child during his or her life and then to descend to his or her heirs, without any power or right on the part of said child to encumber said estate or anticipate the rents thereof, but said trustees shall collect said rents, and, after paying taxes, insurance and keeping the property in repair, pay the rent to the child in person, quarterly, or as the same may be collected according to the terms of the lease; the other half of each share I wish conveyed to each child in fee, to do with as he or she may please. In placing this restriction upon one-half of the estate I give my children I do not wish it understood that I distrust their capacity to manage their own affairs, for I do not, but I believe one-half a share that each will receive will afford ample means to commence and conduct a respectable business, and as the other half will give them a comfortable living in the event that they should be unfortunate in business or otherwise, and now having it in my power, it is my pleasure, as I believe it to be my duty, to shield and protect them against casualties and accident as far as possible." Paragraph 14 is as follows: "The one-fourth of three-fifths of my estate devised to my wife I give her in fee, to do with as she pleases." A division of the estate was made as directed by the will, and the lot involved in this suit was a part of the share set off to be held in trust for the appellant. After-

ward, upon the petition of the executor to the Louisville chancery court in the State of Kentucky, a trustee was appointed to receive said share of the appellant, to be held in trust, and the commissioner of the court executed a deed of the property to the trustee under the direction of the court, "to be held by him as trustee and in trust for the said Adele L. Shreve, under and in accordance with all the powers, provisions, limitations and restrictions and as directed by the will of said Thomas T. Shreve, deceased." That deed was dated July 1, 1870, and there have been successive trustees under decrees of the Louisville chancery court to whom the property was conveyed upon the same terms and conditions, the last trustee being Bland Ballard, husband of the appellant, who died leaving her his widow and the three children above named as his heirs-at-law.

The life estate of the appellant in the property conveyed to the trustee is equitable, and the only question to be determined is whether the remainder limited to her heirs is equitable or legal. If the remainder to the heirs is equitable, then, under the rule in *Shelley's case*, the appellant has an equitable title in fee simple; but if the remainder is legal, the word "heirs" is a word of purchase and not of limitation and the appellant has only an equitable life estate, because the rule does not apply unless the freehold estate limited to the ancestor and the remainder to the heirs are of the same quality,—that is, they must both be legal or both equitable. (*Lord v. Comstock*, 240 Ill. 492.) A very full statement of the rule quoted in *Baker v. Scott*, 62 Ill. 86, from Preston on Estates, is this: "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and afterward, in the same deed, will or writing, there is a limitation, by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally or his heirs of his body by that name in deeds or writings of conveyance and by that or some such name in

wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation."

The will did not, in terms, devise the property, or any estate in it, to the trustee, either with or without words of inheritance, but directed a division of the residue of the estate and a conveyance to a trustee of one-half of each share, to be held for the use and benefit of each child during his or her life. A conveyance was made to a trustee in trust for appellant under and in accordance with all the powers, provisions, limitations and restrictions and as directed by the will, and the other half was conveyed to her in fee, to do with as she pleased. The estate of the trustee is therefore the same as if there had been a devise to him on the trusts declared by the will. Where there is a devise in terms to a trustee, either with words of inheritance, or, under section 13 of the Conveyance act, without such words, the devise is *prima facie* of a fee, unless limited or restrained by other provisions of the will. To determine whether an estate so devised in terms is restrained or limited, the nature of the trust and the duties of the trustee are to be considered and are always controlling as to the quantity of the estate which the trustee takes. His estate in every case will depend upon the exigencies of the trust and the duties imposed upon him. Whatever the form of the devise and whether words of inheritance are used or not, the trustee will take so much of the legal estate as the purposes of the trust require. It is not necessary that there should be a formal devise to the trustee, but he will acquire an estate commensurate with the powers conferred and the purposes to be accomplished. If the fee is required it will be taken, and if the trustee will be enabled to execute the trust with a less estate, that alone will vest in him. If a trustee is required to collect and pay the rents of property for a definite period he will take an estate for years. If

he is charged with such duties for the life of an individual he will take an estate for the life of that person, and if his duties are of indefinite duration he will take the fee. (*West v. Fitz*, 109 Ill. 425; *Kirkland v. Cox*, 94 id. 400; *Green v. Grant*, 143 id. 61; *Lawrence v. Lawrence*, 181 id. 248; *McFall v. Kirkpatrick*, 236 id. 281; *Emmerson v. Merritt*, 249 id. 538.) In this case the conveyance was to be made to a trustee, to be held for the use and benefit of each child during his or her life, and the ordinary and natural meaning of those words is that the trustee for appellant was to have an estate during her life. The powers and duties of the trustee were declared to be to collect rents, and, after paying taxes, insurance and keeping the property in repair, pay the rent to the child in person, quarterly, or as the same might be collected according to the terms of the lease. All duties of the trustee will end at the death of appellant, and he is given no power and charged with no duty to do anything afterward. There is no provision for a conveyance to the heirs, but the testator's intention was that the fee should pass to them, without the aid of any conveyance, upon the death of the appellant. While the legal and technical meaning of the word "descend" is to pass by inheritance by operation of law, it is clear that the testator used it as meaning that the title should pass, by virtue of his will, in like manner as property descends without any conveyance and as distinguished from a conveyance or grant.

The argument for appellant rests upon the statements of the will that the testator desired the one-half of each share which was to be set apart and conveyed to a trustee to be income-paying real estate, and that he believed such half would give to each child a comfortable living if unfortunate in business, or otherwise. Counsel find in these statements an intention of the testator that a trustee should have all the powers necessary to provide a continuous income sufficient to afford the appellant a comfortable living



during the existence of the trust, and therefore an intention that the trustees should have power to execute long-term leases beyond the life of the appellant and to mortgage the fee so as to maintain the income-paying character of the property. The testator had been leasing this lot for five years at a time, but he did not select this piece of property, or any other, to be conveyed to a trustee. He merely directed that in the division income-paying property should be set apart and conveyed to a trustee, and the persons entrusted with the division exercised their judgment in selecting the lot as property that would produce income. If the will shows an intention of the testator that the trustee should have such powers as the making of leases for ninety-nine years or mortgaging the property, the trustee would necessarily take the fee, because where a lease or mortgage is made by a trustee, not under a mere power, the grant is out of the estate of the trustee. It is probably true that greater income could be obtained if the trustees had power to make long-term leases or to encumber the fee by a mortgage, but we find nothing in the will to justify the belief that the testator intended to grant any such powers. It might well be that the testator believed that his property was of such character and extent that under the terms of the will a comfortable living would be afforded to each child, but if it has turned out differently, that fact ought not to override a clearly expressed intention as to the extent of the trustee's estate for the sole purpose of vesting the entire fee simple title in the appellant and destroying the remainder. An argument that it would have been better if the testator had given the trustee power to lease for any term beyond the period of the active trust or to mortgage the property for the purpose of making improvements, which would have given the trustee a fee simple title, would not authorize an alteration of the will. The construction of the will cannot be made to depend upon subsequent facts or conditions arising forty years after

the will took effect. When the conveyance was made to the trustee as directed by the will he took a legal estate for the life of the appellant in trust for her for her life, and a legal remainder was devised to those persons who will answer the description of her heirs at the time of her death.

The chancellor gave a correct construction of the will, and the decree is affirmed.

*Decree affirmed.*

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LOUISA S. FRENCH, Appellant, *vs.* DORR W. THOMAS *et al.*  
Appellees.

*Opinion filed October 25, 1911—Rehearing denied Dec. 7, 1911.*

1. JUDGMENTS AND DECREES—*a bill will lie to impeach a decree obtained by fraud.* A court of chancery has power to entertain a bill to impeach a decree obtained by fraud, and if the allegations and proof are sufficient the decree may be vacated as a cloud upon the complainant's title.

2. SAME—*what constitutes fraud in obtaining a decree.* If a complainant in a bill to quiet title has full knowledge of a claim of ownership and possession by a certain person to the premises involved but fails to make such person a party except under the description of unknown owners, there is such fraud upon the court in obtaining the decree as to render the decree void as to such person and open to collateral attack.

3. PLEADING—*what must be alleged in a bill to impeach decree.* A bill to impeach a decree for fraud need not set out all of the proceedings with the same certainty as is required in a bill of review, but it must set out such proceedings with sufficient certainty to enable the court to determine who were the parties complainant and defendant, the nature of the proceeding and what constituted the alleged fraud.

4. SAME—*when bill to impeach decree should set out decree in full.* Where the complainant in a bill to impeach a decree claims that the decree was obtained by fraud, in that neither she nor her grantors were made parties except by the description of unknown owners, notwithstanding the complainant had full knowledge of their claim and possession, the bill should set out the decree in full and so much of the proceedings leading up to it as will show the

full nature of the relief sought and upon what the court based its claim to have jurisdiction over the parties.

5. SAME—*a court will not impeach a decree except upon clear proof.* A court will not impeach a former decree or judgment and vacate the same except upon clear proof, and where the complainant claims that she was not a party to the former proceeding she must show by her bill such a state of facts as would have entitled her to a recovery in the former proceeding had she been a party.

6. SAME—*bill should show whether rights of third parties have intervened.* A bill to impeach a decree for fraud in obtaining it without making the complainant a party should show whether the rights of third parties have intervened, as in such case the lack of jurisdiction does not appear on the face of the record so as to charge third persons with notice, but may be shown by clear extrinsic evidence if the rights of third parties have not intervened.

7. LACHES—*general rule as to time for bringing bill to impeach decree—laches.* The general rule is that a bill to impeach a decree for fraud can be brought only within the time allowed for the suing out of writs of error if the complainant is under no disability and is not ignorant of his rights.

8. SAME—*when bill to impeach decree fails to show that complainant is not guilty of laches.* A positive allegation that the complainant in a bill to impeach a decree entered six years before the bill was filed was ignorant of her rights until less than a year before filing the bill does not show that she is not guilty of *laches*, where it is not shown when the former decree was entered or that complainant acquired her interest before her grantors had knowledge of the former decree, although the bill alleges that her grantors did not have such knowledge until long after the decree was entered.

APPEAL from the Circuit Court of McHenry county;  
the Hon. CHARLES H. DONNELLY, Judge, presiding.

WALTER G. FRENCH, for appellant.

C. P. BARNES, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

This is a bill filed by appellant in the circuit court of McHenry county to impeach a former decree of that court for fraud, and to set the same aside, so far as it affects

the interests of appellant, as a cloud upon her title. A demurrer was sustained to the original bill. An amended bill was filed by leave of court, to which a general and special demurrer was also sustained, and appellant having elected to stand by her bill, a decree was entered dismissing the same for want of equity. From that decree this appeal has been perfected.

The bill seeks to impeach and set aside a former decree quieting the title to certain real estate known and described as the "mill lot," in Hubbard's addition to the village of Algonquin, situated on the east side of Fox river, and to a mill-dam abutting thereon and the water rights and flowage appurtenant thereto. The amended bill alleges that appellant is the owner in fee and in possession of lots 3 and 4, in block 2, in the village of Algonquin; that the premises abut on Fox river and constitute the west shore of the river, with a shore line of 150 feet; that pursuant to an act of the legislature approved February 11, 1853, authorizing William Sloan to build a mill-dam across Fox river, a dam was constructed across the river at the village of Algonquin, with the west end abutting on the premises now owned by appellant and the east end abutting upon said premises known as the mill lot, in Hubbard's addition, and that, as the owners of the said premises, in the erection of said dam and under the covenants and agreements in connection therewith the grantors of appellant became and were, and appellant is now, entitled to the use of one-half of the water power of said Fox river at said dam to the middle of said river, and that by *mesne* conveyances, and the adjudications, judgments and decrees of courts of competent jurisdiction, appellant became and is vested with title in fee to said premises and to the exclusive ownership and the right to use three-fourths of the waters of Fox river at said dam and three-fourths of the water privileges connected therewith and appurtenant thereto, which said water rights so appurtenant to the premises are now of great

value. The amended bill further alleges that on December 3, 1904, appellees filed their bill of complaint in the circuit court of McHenry county against the unknown heirs and devisees of Horace Hubbard and others, and unknown owners, to quiet the title to the said mill lot, situated on the east bank of the river, to the mill-dam extending across the river and the water rights at that point, in which bill of complaint it was alleged that the property to which the title was sought to be quieted consisted of a mill property, and that appellees were the owners of the dam extending across Fox river near said premises and an undivided one-quarter of the water power and flowage of the river at that point. By that part of the former bill set out it is further alleged that there may be persons interested in said mill lot and in the said dam and the right of flowage, water power and water in said river who are unknown to appellees. The present bill alleges that in addition to other persons, without naming them, the former bill made the unknown owners of the mill lot, the unknown owners of the dam and the unknown owners of the water power, flowage, water rights and privileges to the water of Fox river at Algonquin village, defendants, and prayed that the appellees might be decreed to be the owners of the premises described, the dam and the said water power, rights and privileges, and that the respective clouds on their title be canceled and removed. The bill then proceeds to set out a portion of the decree quieting the title in appellees and finding them to be the owners of the premises, the dam and all the water rights at that point. The allegations of the present bill as to the extent of the possession of appellant and her grantors are somewhat vague and uncertain, being as follows: "That complainant and her grantors have been, and she is now, in full, complete, adverse, notorious, exclusive and undisputed possession of said premises and of the water rights and flowage in said Fox river adjacent to said premises, as aforesaid, and that she is, and her grantors have been, so

entitled and vested for more than fifty years last past," and during that time have paid all taxes and assessments levied thereon,—all of which was well known to appellees at and before the filing of their bill. It is alleged that although this ownership and possession were known, neither complainant nor her grantors were made parties defendant to said bill.

The appellant insists that she is entitled to the remedy sought under this bill and that the bill is sufficient, while, on the other hand, appellees contend that however erroneous the former decree may have been it cannot be thus attacked collaterally. A court of chancery has the undoubted power to look into a judgment or decree of any court, and, if it finds that such judgment or decree was obtained by fraud, to cancel and vacate the same. (*Boyden v. Reed*, 55 Ill. 458.) A bill may be maintained to impeach a decree obtained by fraud, and the owner of property affected has the right to have it removed as a cloud on his title. (*Johnson v. Johnson*, 30 Ill. 215; *Campbell v. McCahan*, 41 id. 45.) If appellees by the former bill, with full knowledge of a claim of ownership and the possession of appellant or her grantors of the premises involved, or any part thereof, did not seek to make appellant or her grantors then claiming an interest in the property parties defendant except under the description of unknown owners, they were guilty of practicing a fraud upon the court, and the decree, so far as the rights of appellant or such grantors is concerned, is void, and being void can be attacked collaterally. Such a situation, however, is not clearly disclosed by this bill. One of the special grounds of demurrer assigned and one of the reasons urged here to the insufficiency of the bill is, that the bill does not sufficiently state the process and pleadings in the former cause. While in a case of this kind it is not necessary to set out all of the proceedings with the same certainty that is required in a bill of review, still they must be set out with sufficient certainty to enable the court to

determine who were the parties complainant and defendant, the nature of the former proceedings and what constituted the fraud alleged. A bill to set aside a decree for fraud must state the decree and proceedings which led to it, with the circumstances of fraud, in detail, on which it is sought to be impeached. (*Boyden v. Reed, supra.*) This bill sets out but a portion of the former bill and a portion, only, of the decree in that case. The portions of the bill and decree set out are the only proceedings in the former suit disclosed by this bill. The bill should have set out the decree of the former suit in full and so much of the proceedings leading up to the decree as would show the full nature of the relief sought and upon what the court based its claim to have jurisdiction over the parties. This bill does not disclose who all the parties were to the former suit. Neither does it disclose at what time appellant acquired title to the premises described as being in block 2. It alleges that John H. McKinley was the grantor of appellant, but whether he or appellant or some of the other grantors in the chain of title owned the premises at the time the former bill was filed cannot be determined from the allegations of the present bill. Appellant alleges in her bill that neither she nor her grantors were made parties defendant to the former proceedings; but, giving this allegation a strict construction, it would still state the truth although McKinley may have been the owner of the premises at the time the former bill was filed and may have been made a party defendant in that proceeding, provided the other grantors of appellant were not made parties. The bill is defective for failure to set out sufficiently the proceedings in the former suit.

From the face of this bill it appears that the premises now owned by appellant were not involved in any way in the former proceeding. While it is true that in the former suit appellees sought to have the title to the dam quieted, appellant makes no claim of title to or interest in the dam except such as might be involved in her claim to the own-

ership of three-fourths of the water rights and flowage of the river at that point. She does not set out in her bill the private act of the legislature authorizing the construction of the dam or the ownership of the dam after its construction. She does allege that by virtue of the construction of the dam her grantors became entitled to and owned one-half of the water rights and flowage, and that by "*mesne* conveyances, and the adjudications, judgments and decrees of courts of competent jurisdiction," she acquired title in fee to said lots and the exclusive ownership and the right to use three-quarters of the flowage and water privileges at that point. She is content to rest with these general statements or conclusions, without specifically giving the source of her title or right to the premises and appurtenances. Greater certainty and clearness is required in a bill of this character than in the ordinary bill in chancery. A court will not impeach a former decree or judgment and vacate the same except upon clear proof, and a complainant must show by his bill, when claiming, as here, that he was not a party to the former proceedings, such a state of facts as would have entitled him to a recovery in the former proceeding had he been made a party thereto.

This bill does not disclose whether the rights of innocent third parties have intervened and will be affected by the relief sought. If the court did not have jurisdiction over appellant or her grantors in the former proceeding the decree entered would be void as to her or them. Where such lack of jurisdiction appears on the face of the record third parties would take with notice of the defect, but where, as is claimed here, the lack of jurisdiction does not appear on the face of the record it may be shown by evidence outside the record, provided the evidence is clear and satisfactory and the rights of third parties have not intervened. *Kochman v. O'Neill*, 202 Ill. 110.

The appellees contend that appellant has been guilty of *laches*. The general rule is, that a bill to impeach a decree



for fraud can be brought only within the time allowed for the suing out of writs of error when the complainant is under no disability and is not ignorant of his rights. (*Sloan v. Sloan*, 102 Ill. 581; *Allison v. Drake*, 145 id. 500.) As the bill in the former proceeding was filed December 3, 1904, and the present bill was not filed until December 24, 1910, it was incumbent upon appellant to disclose clearly by her bill the reasons for the delay. While there is a positive allegation in the bill that appellant had no knowledge whatever of the former proceedings, or the decree entered therein, until within less than a year of the time of filing her bill, the allegations in regard to the knowledge of her grantors is not so specific. That allegation is, that neither of her grantors had knowledge of the former proceedings until long after the entry of the decree therein. As the bill does not disclose when the former decree was entered, who owned the premises in question and was claiming the water rights at the time the former proceedings were instituted or when appellant acquired her title, this allegation is too indefinite. If appellant held the title at the time the former bill was filed, the allegation in regard to notice is sufficient to relieve her of the charge of *laches*. If she purchased subsequently, she would be bound by knowledge acquired by any of her grantors before he parted with the title. The bill fails to show that her grantor did not have notice of the former proceedings while he held the title. By her failure to show this and to disclose when she acquired her title appellant has failed to show that she has not been guilty of *laches*.

For the reasons given, the demurrer was properly sustained. The bill should not have been dismissed absolutely, and the decree of the circuit court is modified so that the order is that the bill be dismissed without prejudice to appellant. As so modified the decree is affirmed.

*Decree modified and affirmed.*

THE PEORIA RAILWAY COMPANY, Appellant, vs. THE  
PEORIA RAILWAY TERMINAL COMPANY, Appellee.

*Opinion filed October 25, 1911—Rehearing denied Dec. 14, 1911.*

1. MUNICIPAL CORPORATIONS—*privilege to use streets is not always a mere license.* The privilege to use the streets of a city, when granted by ordinance, is not always a mere license revocable at the pleasure of the municipality granting it, for if the grant is for an adequate consideration and is accepted by the grantee the ordinance ceases to be a mere license and becomes a valid and binding contract; and the same result follows where a mere license is acted upon in a substantial manner before revocation, so that to revoke it would be inequitable.

2. SAME—*city cannot, after granting portions of street to street railway, grant same portions to another.* Although a city cannot grant the exclusive use of its streets to a street railway company, yet when it has granted the use of certain streets and specified the portion to be occupied by the street railway company, and the latter has accepted the grant and constructed its road according to the grant, the city cannot thereafter, during the continuance of the contract, grant the same portion of the street to another street railway company.

3. STREET RAILWAYS—*when a company has the right to exclude another company from its right of way.* The fact that the city, when granting street railway privileges, reserves the right to grant the use of the tracks to any interurban company upon certain conditions specified in the grant, does not give the city the right to grant the use of the tracks to an interurban company upon different conditions, and the street railway company has the right to exclude the interurban company from the use of its tracks and the space occupied by its cars unless the interurban company complies with the conditions specified.

4. INJUNCTION—*when street railway company is entitled to relief by injunction.* Where a street railway company has accepted and is complying with an ordinance authorizing it to lay and use double tracks, the inside rails of which are laid two feet from the center of the street, as required by the city, it has a right to enjoin an interurban company from laying its tracks in such street with the inner rails three feet from the center of the street, thereby straddling the street railway tracks, even though the interurban company is acting under the purported authority of an ordinance.

5. SAME—*when a bill for injunction cannot be dismissed.* A bill for an injunction, even though injunction be the only relief

sought, cannot be dismissed for want of equity upon the application for a temporary injunction unless the issues are joined and the whole case is submitted at that time. (*Field v. Village of Western Springs*, 181 Ill. 186, disapproved.)

6. PARTIES—*when city is not a necessary party to bill by street railway company for injunction.* A city is not a necessary party to a bill by a street railway company to enjoin an interurban company from laying its tracks along the street in the portion of the street occupied by the street railway company's tracks, even if the interurban company is acting under the purported authority of an ordinance.

VICKERS, J., dissenting.

APPEAL from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

GRAHAM & GRAHAM, PATTON & PATTON, GEORGE W. BLACK, PINKNEY & McROBERTS, and GEORGE T. PAGE, (GEORGE W. BURTON, of counsel,) for appellant.

JACK, IRWIN, JACK & MILES, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

Appellant, the Peoria Railway Company, filed its bill for injunction in the circuit court of Peoria county against appellee, the Peoria Railway Terminal Company, to restrain appellee from constructing a line of railway on Washington street between Chestnut and Main streets, in the city of Peoria, in accordance with the provisions of an ordinance of the city of Peoria purporting to grant to appellee the right to construct such line of railway.

The bill alleges that in 1904 the Central Railway Company was organized under the laws of this State to operate a street railway in the city of Peoria, and that on December 20, 1904, an ordinance was duly passed by the city council, approved by the mayor and accepted by the Central Railway Company, granting to that company, its successors or assigns, for the period of twenty years, the right to construct, operate and maintain a double-track electric

street railway in certain streets of the city of Peoria, including Washington street from the center line of Chestnut street to the center line of Main street, subject to the provisions, conditions and regulations contained in the ordinance, and also subject to the provisions and regulations of the general ordinances then in force or that might thereafter be adopted by the city, under its police powers, concerning street railways therein. The ordinance contained numerous provisions relating to the construction and operation of the lines of railway, the paving and repair of streets by the railway company, the sale of tickets and issuance of transfers, and the payment of sums of money to the city in lieu of license fees and other charges by the city. It also reserved to the city council the right to grant the privilege of the use of the tracks, wires and power of the railway company to any interurban electric street railway company for the purpose of running its cars from any point at the city limits to any point adjacent to the present location of the Peoria county court house, in the center of the city, provided that such privilege should not be used, when granted, so as to unnecessarily interfere with the traffic and business of the Central Railway Company, and provided further that such privilege should not be used until the interurban company should enter into a contract with the Central Railway Company, the terms and provisions of such contract being specifically set forth in the ordinance and including the following: That such interurban company should furnish to the Central Railway Company a schedule for the regular operation of its cars, which should be maintained and not varied from except for causes beyond the control of the interurban company; that the cars of the interurban company, while upon the tracks of the railway company, should be in charge of a conductor furnished by the railway company; that all passengers on board any car entering upon the tracks of the railway company or boarding the same during its trip over such tracks

should pay a fare in cash or by ticket, and all such fares should be the sole property of the Central Railway Company and should constitute the compensation to be paid by the interurban company to the railway company for the use of its tracks, wires and power; that monthly settlements should be made between the interurban company and the railway company, and all tickets issued by the interurban company and received for fare by the railway company should be paid for or redeemed by the interurban company at the rate of four cents each; that the cars operated upon the tracks of the railway company should not have an overhang exceeding twenty-two inches outside the gauge-line of the rails of the track upon which such cars are operated, and while on the tracks of the Central Railway Company should be subject to reasonable running rules and regulations established by the latter company. The ordinance also reserved to the city council the right to regulate the speed and schedule time of the running of the company's cars, and to make any reasonable rules, orders and regulations as it might deem necessary to protect the interests, safety, welfare and accommodation of the general public in relation to the operation of the railway, not inconsistent with the provisions of the ordinance. The bill further alleges that by virtue of said ordinance and certain other ordinances the Central Railway Company constructed a double-track railway on Washington street from Chestnut street to Main street, except for about 250 feet near the intersection of Walnut and Washington streets, where only a single track was constructed, and that ever since it and its successors have maintained and operated said railway in connection with a large system of railway tracks owned and controlled by appellant in the city of Peoria; that in compliance with said ordinance appellant constructed on the lower side of Washington street, north of Chestnut street, car barns and repair shops, and constructed from its tracks on Washington street a large number of spur-tracks lead-

ing from its main tracks on Washington street to said car barns and repair shops, covering 150 feet on Washington street; that by an ordinance passed February 20, 1906, amending certain sections of the ordinance of December 20, 1904, the Central Railway Company was granted the right to maintain and operate its railway upon Washington street and other streets for twenty years, and that the ordinance of December 20, 1904, as amended by the ordinance of February 20, 1906, is still in full force and effect, and that appellant and its predecessor have complied with all the terms and provisions thereof. The bill alleges that appellant was on May 9, 1906, organized under the general incorporation laws of Illinois, and on June 20, 1906, acquired by deed and assignment from the Central Railway Company all its railway, including the line on Washington street, and all of its property, real and personal, and also the assignment of all licenses, rights and privileges granted the Central Railway Company by the city of Peoria; that it took possession of said railway thereunder and has ever since operated it in conformity with said ordinances; that many people patronize that part of its railway on Washington street, and that appellant has made arrangements to run cars thereon at intervals of eight minutes during eighteen hours of each day.

The bill further alleges that appellee is a corporation organized under the Railroad act of Illinois to construct and operate a commercial railroad from Peoria to Pekin; that about July 2, 1909, the city council of Peoria adopted an ordinance which purported to grant to appellee, for a period of forty years, the right to construct and operate a double-track railway on Washington street from Krause avenue to Hamilton street, a distance of twenty-seven blocks, and including that portion of Washington street between Chestnut and Main streets occupied by appellant's tracks, the ordinance requiring appellee to lay its tracks on Washington street so that the inner rail of each track

should be three feet distant from the center line of said street. The bill alleges that appellant's tracks are fastened to ties bedded in concrete in Washington street, and that the inner rail of each track is approximately two feet from the center line of the street; that under the pretended rights purported to be granted by the city, appellee has constructed its line of railway from Krause avenue north along Washington street to or near Chestnut street, and is now preparing and threatening to continue construction north along Washington street from Chestnut street in the following manner: By laying the inner rail of each of its tracks about three feet from the center line of the street and the outer rail of each track about seven feet eight and one-half inches from the center of the street, thus bringing the inner rails of appellee's tracks about one foot from the inner rails of appellant's tracks and the outer rails of appellee's tracks about one foot outside the outer rails of appellant's tracks, or, in other words, appellee is preparing and threatening to construct its railway tracks so as to straddle both tracks of appellant upon that part of Washington street between Chestnut and Main streets. The bill then alleges that if appellee is permitted to construct its tracks in the manner described, it will take, damage and destroy appellant's property and seriously interfere with the operation of appellant's railway on Washington street and hinder its cars on that street, and prevent it from maintaining its schedule for the operation of cars, and prevent it from discharging its duties as a carrier, and prevent it from carrying its passengers, as it now does, to various business houses located on and in the vicinity of that part of Washington street, and prevent it from carrying passengers to and from the Union depot in Peoria, as it now does, thus depriving appellant of large gains and profits, and break the connection of its system, obstruct and prevent appellant from getting access to its car barns and repair shops on Washington street, and will bisect appellant's railway system, to

the injury of the public and the great and irreparable injury and damage of appellant; that appellee has no right, under its ordinance, to construct its railway so as to interfere with appellant's rights upon Washington street nor so as to confiscate appellant's property, and that the ordinance under which appellee assumes the right and threatens to lay its tracks as aforesaid, is, as to appellant's rights on Washington street, null and void; that appellant is, and always has been, willing to contract with appellee for the joint use of appellant's tracks and power on Washington street upon the terms specified in the ordinance first above mentioned for the use of such tracks, power and appliances by any interurban electric street railway company whenever appellee shall be so authorized by the city council, but that appellee has failed to comply with the terms of that ordinance and refuses to contract with appellant upon the terms therein specified; that unless appellee is restrained from interfering with the rights of appellant and from laying the rails of its tracks between the tracks of appellant, or from constructing its line so as to interfere with appellant, or from connecting its tracks with the tracks of appellant and running its cars on appellant's tracks, as it threatens and intends to do, great and irreparable injury and damage will accrue to appellant, in this: that appellant's cars will be obstructed, delayed and interfered with, it will be prevented from performing its duty as a carrier of passengers and deprived of large profits, and the lives of its employees and passengers will be endangered.

The bill was filed during the January term of the circuit court and a temporary injunction was issued without notice to appellee, upon condition that the notice should be given as soon as practicable and that a hearing should be had within ten days, and that the injunction should continue in force for and during that time and no longer, unless upon the hearing the court should continue it in force. No hearing was had within ten days, and the matter was



not finally disposed of until about two months after the filing of the bill, during all which time the January term was in session. The notice to appellee was given, and it entered its appearance and filed a sworn answer to the bill. The matter then came on for hearing, at which time the following stipulation was entered into and made a matter of record: "It is agreed and stipulated by the parties hereto, in open court, that the answer filed by the defendant shall be treated as an affidavit on this hearing only upon the question as to whether an injunction shall issue upon the bill filed, and that this hearing shall be for the purpose of determining whether an injunction shall issue upon the bill as filed." The record does not disclose that any motion was made to dissolve the temporary injunction, which was evidently treated by the parties and by the court as still being in full force and effect. Nor does it disclose that any papers were filed in the case aside from the bill and the answer which was stipulated should be treated only as an affidavit for the purposes of the hearing. The hearing resulted in a decree dismissing the bill for want of equity and adjudging the costs against appellant, from which decree an appeal has been prosecuted to this court, and among other grounds for reversal it is urged that the ordinance granting the license to appellee is invalid because it impairs the obligation of the contract between appellant and the city of Peoria, and that the bill discloses a proper case for equitable relief.

The method of procedure adopted by the trial court and by the parties upon the hearing, which resulted in the decree dismissing the bill, is unusual. While an answer had been interposed by appellee, by the stipulation of the parties (and the decree of the court shows that the hearing was had upon that stipulation) it was agreed that it should not be treated as an answer but should be treated only as an affidavit in determining the sufficiency of the bill. While we find in the record no motion to dissolve the in-

junction and dismiss the bill, the hearing was in the nature of one on such a motion. The answer having been stipulated out of the record for the purposes of that hearing, there was no place in the record for an affidavit, as an affidavit on motion to dissolve an injunction can only be considered after answer is filed. The whole proceeding is one in the nature of a demurrer to the bill for want of equity, and will be so reviewed by us. This leaves, then, as the only question to be determined, Was the bill destitute of equity on its face?

By the ordinance of December 20, 1904, the Central Railway Company was granted a license to construct and operate a street railway in the city of Peoria, and as a part of the system it was authorized to construct a double track on Washington street from Chestnut to Main. The Central Railway Company accepted the provisions of this ordinance, constructed its railway in the city of Peoria, a part of the same being a double-track railway on that part of Washington street involved here. By the acceptance of this ordinance and the construction and operation of its street railway the ordinance then became a valid and binding contract between the street railway company and the city. The privilege to use the public streets of a city or town, when granted by ordinance, is not always a mere license revocable at the pleasure of the municipality granting it, for if the grant is for an adequate consideration and is accepted by the grantee, then the ordinance ceases to be a mere license and becomes a valid and binding contract; and the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner so that to revoke it would be inequitable and unjust. *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42; *City of Belleville v. Citizens' Horse Railway Co.* 152 id. 171; *People v. Blocki*, 203 id. 363; *City of Chicago v. Chicago and Oak Park Elevated Railroad Co.* 250 id. 486.

Appellant, as assignee of the Central Railway Company, succeeded to its rights and privileges and became entitled to the enjoyment of all the provisions of the contract between the Central Railway Company and the city. By the ordinance granting the license to the Central Railway Company it was provided that the tracks should be laid in the various streets over which permission was given to operate the railway, under the direction of the commissioner of public works. The bill alleges that on that portion of Washington street involved here, where appellant has constructed and is using a double track, the tracks are so laid that the inner rail of each is distant about two feet from the center line of the street, and the bill alleges that these tracks were so laid under the provisions of that ordinance. By the ordinance granting to appellee a license to use this portion of Washington street it is provided that its double tracks shall be so laid that the inner rails shall each be three feet distant from the center line of the street, thus giving the appellee permission to use the same portion of Washington street now being used by the appellant between Chestnut and Main, which would necessarily result in appellee being given permission to occupy the same space along that street with its cars, with its road-bed construction and with its overhead equipment as had theretofore been granted to appellant for its use.

Appellee seeks to sustain the right of the city to grant this license upon the ground that the city has no power to grant an exclusive franchise to a private corporation to use its streets for the purpose of conducting and maintaining a street railway system, and that a grant to a corporation to use its streets for the purpose of conducting and maintaining a street railway system cannot be such an exclusive grant as to prevent the city from granting to another corporation the privilege to occupy its streets for the same purpose. No question is better settled in this State than that a city may not give to a street railway company the

exclusive right to occupy and use its streets for street railway purposes. The power to regulate and control the streets of municipalities in this State is delegated by statute to the municipal authorities. Under the powers conferred upon the municipal authorities they may grant to a street railway company the use of the streets of the municipality for street railway purposes, and may designate and prescribe the particular streets upon which the railway may be constructed and maintained and the particular parts of each street upon which the tracks shall be laid. While a city does not have the right to grant the exclusive use of its streets to one company for the operation of a street railway, having granted a particular company that right and having designated the particular streets which it may use and occupy with its railway system, and the grant having been accepted and acted upon, the city cannot thereafter, and during the term of the contract thus entered into, grant to another street railway company the identical portions of the streets which it has theretofore granted to the first company. A city may grant the right to a second company to construct and operate a street railway system over and upon its streets provided the same can be done without necessarily appropriating that portion of the streets which has been granted to the first company and which is being used by it in the operation of its railway system. While a street railway company cannot, by ordinance, be given the exclusive right to the use of the streets of the municipality, when it is granted the right to construct and maintain a street railway system for a definite period it is thereby given the exclusive right to that portion of the streets granted to it for use for street railway purposes during the time of the grant, and during that time has the right to exclude other street railway companies from the use of its tracks and the space occupied by its cars. *Barsaloux v. City of Chicago*, 245 Ill. 598; *Hamilton Traction Co. v. Ham-*

*ilton Electric Transit Co.* 69 Ohio St. 402; *City Railway Co. v. Citizens' Street Railroad Co.* 166 U. S. 557.

It is urged that the city is only exercising the right which it reserved in the ordinance of December 20, 1904, in granting the right to appellee to use the tracks of appellant on Washington street. It is not pretended, however, that the city is exercising that right in the manner designated in the reservation of that ordinance. The fact that the city in that ordinance reserved the right, under certain conditions, to grant any interurban company the privilege of using the tracks and the motor power of appellant does not authorize the city to grant another company the right to use that portion of the street theretofore granted appellant's assignor and under entirely different conditions from those reserved in the original ordinance. As the city has not attempted to comply with the reservations contained in the first ordinance, the conditions of that ordinance relating to the right to grant permission to an interurban company to use the tracks and motor power of appellant have no bearing whatever upon the facts involved here, and the questions at issue here must be determined just as though no such reservation was contained in that ordinance.

Appellee contends that the city of Peoria is a necessary party defendant, and that the bill was properly dismissed for that reason. The city has no such interest in the matters involved as to render it a necessary party.

Under the allegations of the bill the ordinance of December 20, 1904, constitutes a contract binding and obligatory between appellant and the city, which cannot be arbitrarily revoked or broken. The ordinance to appellee impairs the obligation of that contract and is void as to appellant. The bill discloses a clear right to injunctive relief, and the court erred in dismissing the bill for want of equity.

The decree of the circuit court is reversed and the cause remanded to that court for further proceedings not incon-

sistent with the views herein expressed, and with directions to continue in force the temporary injunction until the final disposition of the cause.

*Reversed and remanded, with directions.*

Mr. JUSTICE VICKERS, dissenting.

Subsequently, upon considering the petition for rehearing in this case, the following additional opinion was delivered:

Per CURIAM: Appellee presents its petition for rehearing, wherein it is represented that we have misapprehended the issues presented to the chancellor and the effect of the decree. It is pointed out that we have misconceived the object, purpose and extent of the original restraining order,—that it was simply a stay order for ten days, which was dissolved automatically at the expiration of that time. While no hearing was had within the ten days, as was provided by the order, the notice required was given to the defendant and the hearing was had as soon as the matter could be considered by the court, and, as stated in the original opinion, it is apparent that the parties and the court all treated the injunction as remaining in full force and effect.

It is contended that the hearing was had upon an application for a temporary injunction, at which time the bill and the answer, treated as an affidavit, were considered. That the chancellor did not regard the proceeding as an application for a temporary injunction is evident from the fact that the hearing resulted in an involuntary dismissal of the bill. A bill, even though injunction be the only relief sought, cannot be dismissed for want of equity upon an application for a temporary injunction unless the issues are joined and the whole case is submitted at that time. In *Field v. Village of Western Springs*, 181 Ill. 186, we held this could be done, but we do not regard it as the

proper practice, and that case will not be followed in that particular.

Appellee contends that the chancellor decided the matters here involved upon the merits from the facts as presented by the bill and affidavit, and that the case should be disposed of here upon its merits. There was no answer, as such, on file, it having been stipulated that the answer be treated as an affidavit only for the purposes of the hearing. The whole case was not presented to the court and the hearing was not upon the merits. Upon a consideration of the whole record we adhere to our view that the hearing was in the nature of one on a motion to dissolve the injunction theretofore issued. In its petition for rehearing appellee concedes that the bill, on its face, is not obnoxious to a general demurrer for want of equity. That being true, appellant is entitled to a hearing upon the merits.

We perceive no reason why the original opinion should be changed or modified in any way, and the rehearing is therefore denied.

*Rehearing denied.*

THE CHICAGO TERMINAL TRANSFER RAILROAD COMPANY,  
Plaintiff in Error, vs. DAVID BARRETT, Defendant in  
Error.

*Opinion filed December 6, 1911.*

1. RES JUDICATA—*determination of question by court of competent jurisdiction is binding upon the parties.* When a court having jurisdiction decides a controversy the question involved is settled forever between the parties to the suit and persons in privity with them, and neither can again litigate with the other any fact or question actually or directly in issue which was passed upon and determined by the court.

2. SAME—*fact that former adjudication was upon same question must be established.* To give application to the doctrine of *res judicata* it must appear that the former adjudication was upon the same question presented in the subsequent suit, and if that

fact does not appear from the record or decree in such suit it may be shown by extrinsic evidence.

3. *SAME—certificate of evidence is part of the decree and shows what issues were tried.* The evidence in a chancery case may be preserved either by reciting the facts proved in the decree or by a certificate of evidence, and the certificate of evidence is part of the decree and shows what issues were tried.

4. *SAME—when dismissal of a bill is conclusive against complainant's claim of title.* A dismissal on the merits, for want of equity, of a bill to remove a cloud from title and quiet title in the complainant under his claim of ownership by adverse and exclusive possession of the land for twenty years is conclusive as between the parties that the complainant has no title, where the only issue presented was the nature of the complainant's possession and whether it was adverse to the defendants.

5. *SAME—when dismissal of bill cannot rest upon the ground of a remedy by ejectment.* The dismissal, for want of equity, of a bill by one in possession of land to quiet title and remove a cloud cannot be said to rest upon the ground that the complainant had an adequate remedy at law by ejectment, since the complainant, being in possession, could not bring an ejectment suit.

6. *SAME—when the dismissal of a cross-bill is not res judicata against defendant's title.* Where a bill to quiet title and remove a cloud, filed by a person in possession of the land, is dismissed for want of equity, the subsequent dismissal, on demurrer, of the cross-bill of a defendant who claims title from the government is not an adjudication that such defendant has no title, but such dismissal is proper because the defendant, not being in possession, would have a remedy at law by ejectment.

7. *EJECTMENT—when refusal to admit transcript of record of chancery suit in evidence is error.* It is error, in an ejectment suit, to refuse to admit in evidence, at the instance of the plaintiff, the record of a former chancery suit brought by defendant against the plaintiff to remove a cloud and quiet title, where such record shows that the complainant's claim of title by adverse possession was determined against him and that the defendant's claim that the complainant held possession as lessee of defendant's grantor was sustained.

8. *SAME—tenant cannot dispute his landlord's title.* A tenant is estopped to dispute the title of his landlord or the landlord's grantees, or to claim adversely to such title, without first surrendering possession; and if the fact of such tenancy is established in a chancery suit between the parties it is not necessary for the landlord, in a subsequent ejectment suit, to go back of the decree to prove title as against the tenant.



WRIT OF ERROR to the Circuit Court of Cook county; the Hon. E. M. MANGAN, Judge, presiding.

JESSE B. BARTON, for plaintiff in error.

JOHN J. COBURN, FRED W. BENTLEY, and DAVID T. ALEXANDER, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error, the Chicago Terminal Transfer Railroad Company, brought its action of ejectment in the circuit court of Cook county against the defendant in error, David Barrett, for the possession of those parts of five lots in the town of Brighton, in said county, lying east of the right of way of the Chicago Junction Railway Company. The cause came to trial before the court and a jury upon the issue formed by a declaration alleging ownership in fee by the plaintiff and a plea of not guilty. The court directed the jury to find the defendant not guilty, and after the return of the verdict so directed, the court overruled motions for a new trial and in arrest of judgment and entered judgment on the verdict. A writ of error was sued out of this court and the record has been brought here for review.

The plaintiff offered in evidence a transcript of the record of a suit in equity in the circuit court of Cook county in which the defendant, David Barrett, was complainant, and the plaintiff, the Chicago Terminal Transfer Railroad Company, and others, were defendants, which was instituted to quiet the title of Barrett and remove tax deeds and conveyances under the same as clouds upon such title. The transcript was objected to and the court sustained the objection. The plaintiff proved that it had acquired the title of the other railroad companies which were defendants in the equity suit, and this was the only evidence ad-

mitted by the court. The questions to be determined are whether the transcript of the record was admissible in evidence, and if so, whether it would have been sufficient to authorize a judgment for the plaintiff.

When a court having jurisdiction decides a controversy, the question involved is settled forever between the parties to the suit and persons in privity with them, and neither can again litigate with the other any fact or question actually or directly in issue which was passed upon and determined by the court. *Hanna v. Read*, 102 Ill. 596; *Tilley v. Bridges*, 105 id. 336; *Wright v. Griffey*, 147 id. 496; *Union Pacific Railway Co. v. Chicago, Rock Island and Pacific Railway Co.* 164 id. 88; *Dempster v. Lansingh*, 244 id. 402; *People v. Chicago, Burlington and Quincy Railroad Co.* 247 id. 340.

The transcript of the record of the former suit offered in evidence by the plaintiff and excluded by the court showed the following facts: Barrett filed his bill on November 11, 1902, alleging that he was the owner in fee of the property in controversy in the subsequent ejectment suit; that he derived his title under the twenty years Statute of Limitations by open, exclusive and adverse possession for more than twenty years, and that there had been certain tax sales, under which deeds had been executed and conveyances made, which were void on account of defects in the proceedings. The bill was amended several times and a supplemental bill was filed and amended, and the bill in its final form made the averments already stated, and also that the Chicago Terminal Transfer Railroad Company had in its possession a writing purporting to be a lease to Barrett from the Chicago, St. Louis and Pittsburgh Railroad Company to the property in question, dated December 1, 1884. Barrett charged that the lease was not his deed and if the signature was his genuine signature it was obtained by fraud and circumvention. Several railroad companies, including the Chicago Terminal Transfer Rail-

road Company, were made defendants with individuals, and the bill contained an offer to pay the amount due under the tax sales and prayed that the tax deeds and conveyances under the same be set aside and declared null and void as clouds upon the title of Barrett; that his title be confirmed and quieted and defendants forever enjoined from disputing the same and from interfering in any manner with his possession and enjoyment of the property, and also for general relief. Only two of the defendants answered. The Chicago and Alton Railroad Company by its answer denied that Barrett was the owner in fee of the premises described, and called for proof of the other averments of the bill. The Chicago Terminal Transfer Railroad Company by its answer denied that Barrett was the owner in fee, or otherwise, of the property or any part of it, or that he had derived title by possession for twenty years or any other period, and alleged that whatever possession he had was by the consent of that company and its predecessors in title, and that his occupation was as tenant of the said company and its said predecessors. The Chicago Terminal Transfer Railroad Company also filed its cross-bill on December 1, 1903, claiming title through *mesne* conveyances from the government, and alleging that it and its grantors had been in actual possession, through its tenant, for more than twenty years. David G. Hamilton, who was a defendant to the original bill, was also made a defendant to the cross-bill as holder of tax deeds alleged to be void, and the prayer of the cross-bill was that the tax deeds be set aside and Barrett be ordered to surrender possession. The cause was heard and the original bill was dismissed for want of equity on December 4, 1903. Barrett had demurred to the cross-bill, and that bill was retained for further adjudication. A certificate of evidence was filed, containing all the evidence heard by the court. Barrett and several witnesses testified that he had been in the exclusive possession of the property for more than twenty years,

and there was no contradictory evidence on the question of possession, which was not in controversy in any manner. A stipulation of facts was made showing defects in the tax proceedings which would render the deeds, and the conveyances under them, void. The Chicago Terminal Transfer Railroad Company did not dispute the fact of possession by Barrett, but offered in evidence a lease dated December 1, 1884, from the Chicago, St. Louis and Pittsburgh Railroad Company to Barrett, of the premises in controversy for a rental of \$25 per annum, subject to cancellation on thirty days' notice, together with the testimony of two subscribing witnesses to the execution of the lease by Barrett and the evidence of other witnesses that his signature was genuine. The railroad company also proved that it had succeeded to the title of the Chicago, St. Louis and Pittsburgh Railroad Company through successive conveyances. Witnesses for Barrett gave testimony in rebuttal tending to show that the signature on the lease was not his genuine signature. Upon consideration of the evidence the court dismissed the bill for want of equity, and afterward, on May 24, 1904, sustained the demurrer of Barrett to the cross-bill. The action of ejectment was begun on September 26, 1904.

The bill in equity filed by Barrett contained two material averments upon which he based his prayer for relief: First, his ownership of the premises, by virtue of the Statute of Limitations, through open, exclusive and adverse possession for twenty years; second, the invalidity of certain tax deeds and conveyances made by the holder of the tax titles. To meet a claimed defense the bill alleged that the lease in the possession of the Chicago Terminal Transfer Railroad Company was void. That company made no denial of the possession of Barrett but denied that such possession was adverse, and alleged that it was held by him as tenant under the lease executed by its predecessor in title. The invalidity of the tax deeds was agreed upon and there

was no question about them. The issue formed and the question tried related solely to the nature of Barrett's possession and whether it was adverse to the Chicago Terminal Transfer Railroad Company. That issue was found against Barrett by the decree, which dismissed his bill for want of equity. A stipulation having been made that the tax deeds were clouds upon the title of Barrett, if he had any, the court necessarily would have removed such clouds if it had found that Barrett had any title. The decree dismissing the bill for want of equity rested, and could have rested, upon no other ground than want of proof of title in Barrett.

To give application to the doctrine of *res judicata* it must appear that the adjudication was upon the same question presented in the subsequent suit, and if that fact does not appear from the decree or record it may be shown by extrinsic evidence. But in this case a resort to extrinsic evidence is not necessary, since it is shown on the face of the record that the matter litigated in the chancery suit was the same as in the ejectment suit. The certificate of evidence filed was a part of the decree and shows what issue was tried. Under the early practice, when suits in equity were heard upon depositions they were copied in the decree, but after the statute authorized oral evidence in chancery cases the practice of reciting in the decree the facts proved became common, and it was held that the evidence might be preserved in that way or by a certificate of evidence or a master's report. The evidence may be preserved by either method. (*Glos v. Beckman*, 168 Ill. 74.) In whatever form the evidence is preserved it is a part of the decree. *White v. Morrison*, 11 Ill. 361; *Cooley v. Scarlett*, 38 id. 316; *Bennett v. Bradford*, 132 id. 269; *Conductors' Benefit Ass'n v. Leonard*, 166 id. 154; *Gorman v. Mullins*, 172 id. 349; *Crow v. Harrison*, 248 id. 462.

The one question litigated in the equity suit was common to both suits, and that was the title of Barrett. The action of ejectment under our statute is an original action

for the recovery of title as well as possession. (*Guyer v. Wookey*, 18 Ill. 536.) The plaintiff in ejectment must show title in himself, and so must the complainant in a bill to set aside a cloud and quiet title. (*Wing v. Sherrer*, 77 Ill. 200.) Unless the complainant shows title in himself he cannot complain that there is a cloud upon the title. (*Hutchinson v. Howe*, 100 Ill. 11.) Where the title of the complainant in a bill to remove a cloud is put in issue he must prove a *prima facie* title superior to that of the defendant, and in ejectment proof of a *prima facie* title is sufficient as against a mere intruder who fails to set up or prove title in himself. (*Coombs v. Hertig*, 162 Ill. 171.) It makes no difference as to the form of action, and a judgment in an action of trespass to real estate is *res judicata* in an ejectment suit between the same parties involving the same land, where a plea of *liberum tenementum* was filed in the trespass suit and the question of the ownership of the land was tried. (*Herschbach v. Cohen*, 207 Ill. 517.) The dismissal of Barrett's bill on the merits for want of equity was a final and conclusive adjudication that he did not have the title which he claimed.

An attempt is made to sustain the action of the court in excluding the transcript on the ground that the bill might have been dismissed because there was an issue of fact as to the execution of the lease and the court might have left the complainant to his remedy at law, and reliance is placed on such cases as *Lundy v. Lundy*, 131 Ill. 138, and *Lundy v. Mason*, 174 id. 505, where it was held that a court of equity had no jurisdiction because there was a complete and adequate remedy at law by ejectment. Those cases do not apply in any way to the question here. A case cited with much confidence to sustain the ruling of the court is *Phelps v. Harris*, 101 U. S. 370, but that case also does not apply here both because Barrett's possession was not in dispute or the fact doubtful, and because, being in possession, he could not have had a remedy at law. A

bill to quiet title is entertained in equity because a party is not in a position to force the holder of or one claiming an adverse title into a court of law to test its validity. (*Alton Ins. Co. v. Buckmaster*, 13 Ill. 201.) Barrett was in possession and could not have had an action of ejectment, so that his remedy was in equity, and the court could not have dismissed his bill because there was a remedy at law.

It is also urged that the court dismissed the cross-bill of the railroad company, and that such dismissal was *res judicata* that the railroad company had no title. The original bill had been dismissed upon finding the issue of fact against the complainant therein, and his demurrer to the cross-bill was sustained and the cross-bill was dismissed. The railroad company was out of possession, and could have brought, and did soon afterward bring, an action of ejectment, so that the court of equity had no jurisdiction, and if the court had retained the cross-bill it could not have granted the relief asked for. The dismissal of the cross-bill did not settle any question between the parties.

The court erred in refusing to admit in evidence the record in the equity suit, which would have shown that the issues made in that suit between Barrett and the Chicago Terminal Transfer Railroad Company had been finally and conclusively settled; that Barrett, when he filed his bill on November 11, 1902, was not the owner in fee of the property in controversy in the ejectment suit; that he had not had the open, exclusive and adverse possession of the same for twenty years, but, on the contrary, that on December 1, 1884, he became the tenant of the predecessor in title of the Chicago Terminal Transfer Railroad Company, and that the lease was genuine and valid. Litigation or controversy concerning those questions could not be renewed in the ejectment suit, and as the tenancy had been established Barrett was estopped to dispute the title of his landlord or its grantees, or to claim adversely to such title

without first surrendering possession. (*Ankeny v. Pierce*, Breese, 262; *Lowe v. Emerson*, 48 Ill. 160; *O'Halloran v. Fitzgerald*, 71 id. 53; *Sexton v. Carley*, 147 id. 269.) It would, therefore, not have been necessary for the landlord to go back of the decree to prove title as against the tenant.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. E. W. SHIRK, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. TAXES—*board of review has power to make original assessment.* Under section 329 of the Revenue act (Hurd's Stat. 1909, p. 1886,) the board of review may properly make an original assessment of omitted property in the same manner and subject to the same requirement as to notice that the assessor might make under sections 276 and 278 of said act.

2. SAME—*notice to owner must precede assessment by board of review.* Notice to the owner that the board of review will make an assessment of omitted property must precede the making of the assessment, otherwise the assessment is illegal and cannot be made valid by giving a subsequent notice.

3. SAME—*statute authorizing board of review to assess omitted property is not invalid.* The provision of section 329 of the Revenue act authorizing the board of review to make an assessment of omitted property is not unconstitutional upon the ground that it does not specifically provide for notice to the owner, since the board has the same powers as the assessor has under sections 276 and 278 of said act, which sections, as construed in *People v. National Box Co.* 248 Ill. 141, provide for notice.

WRIT OF ERROR to the Municipal Court of Chicago;  
the Hon. ARNOLD HEAP, Judge, presiding.

ULLMANN, HOAG & DAVIDSON, for plaintiff in error.

FRANCIS S. WILSON, County Attorney, and DAVID W. TAYLOR, for defendant in error.



Mr. JUSTICE VICKERS delivered the opinion of the court :

This is a writ of error sued out of this court by E. W. Shirk for the purpose of reviewing a judgment of the municipal court of Chicago against him for \$225.60, recovered by the People of the State of Illinois in an action for delinquent personal property tax for the year 1908. The assessment upon which the judgment is based was an original board of review assessment made by that board in a lump sum, without designating the particular class or classes of property assessed. The errors assigned call in question the validity of the assessment as well as the validity of the statute under which the board of review assumed to act.

Plaintiff in error contends that the assessment in question was void, first, because plaintiff in error had no notice and opportunity to be heard before the assessment was made by the board of review; and further, that even if notice had been given it would not answer the constitutional requirement of due process, because, it is said, no notice is required by the statute.

The evidence shows that the plaintiff in error was not assessed by the local assessor in any amount on personal property in the town of South Chicago, where he resided; that on the 31st day of August, 1908, the board of review made a personal property assessment against him of a gross amount of \$3000, and placed the same on a schedule in the column headed "Total assessed value as corrected by board of review." Alexander J. Johnson testified that the assessment in this case was made in a lump sum upon information received by the board that plaintiff in error was a capitalist worth two or three million dollars and was engaged in loaning money; that it was not known whether he had mortgages, money on hand or other assets or the amount and value of either. This witness testified that it was customary to send a postal-card notice before an assessment was made by the board of review. He does not

know whether such notice was sent in this case or not. It is admitted by plaintiff in error that a postal-card notice was received by him in November, 1908, which was long after the assessment had been made. The postal-card notice in November is the only notice, so far as the record shows, that the plaintiff in error received of this assessment. Section 276 of the Revenue law (Hurd's Stat. 1908, p. 1797,) provides for the assessment of property that has been omitted in the assessment of any year or number of years by the assessor, and section 278 provides that before an assessment of omitted property shall be made by the assessor, the owner, if known, shall be notified by the assessor or clerk of such assessment. Section 329 of the Revenue law provides, among other things, that it shall be the duty of the board of review to assess all property subject to assessment which shall not have been assessed by the assessor, and confers upon the board of review the same power in respect to making assessments that the assessor has. Under the broad powers given to the board of review by this section we have no doubt that such board may properly make an original assessment of omitted property in the same manner, subject to the same requirement as to notice, that the assessor might make under sections 276 and 278 above referred to. In the case of *Carney v. People*, 210 Ill. 434, this court held that the board of review had the power to make an original assessment upon giving the tax-payer notice, where the property had not been previously assessed. In that case the distinction between an original assessment made by the local assessor and the board of review was pointed out, and it was there held that the publication of the assessed list and the statute providing for a hearing before the board of review met the constitutional requirement of due process of law, while in the case of an original assessment by the board of review there was no statute requiring a person who had not been assessed at all to attend the meetings of the board of review in an-

ticipation that an attempt would be made to assess some amount of taxes against him. The effect of that decision is to establish the rule that before the board of review can legally make an original assessment against a tax-payer he must have notice and an opportunity to be heard. As already pointed out, there is no proof in the record before us that the tax-payer had any notice except the postal-card notice, which was received by him more than two months after the assessment had been made. In order to meet the constitutional requirement of due process of law the notice should precede the action which is to affect the property rights of the citizen, so that the property owner may have a chance to be heard before action is taken. The notice given in this case does not meet the constitutional requirement any more than a summons would that was served after the court had heard a cause and rendered its judgment. The tax for which the judgment below was rendered was illegally assessed and the court erred in rendering judgment therefor.

Plaintiff in error makes the further contention that the statute which authorizes the assessment of omitted property by the board of review is unconstitutional because the statute does not specifically require notice. Sections 276 and 278 of the Revenue law, as construed by this court in *People v. National Box Co.* 248 Ill. 141, provide for notice, and as thus construed the statute is not open to the constitutional objection urged by plaintiff in error. But for the reason already given, the tax levied in this case was illegal and the judgment of the court below must be reversed. Since the defect of notice cannot be cured upon another hearing we see no reason for remanding the cause.

*Judgment reversed.*

THE ILLINOIS KAOLIN COMPANY, Appellee, vs. THOMAS B. GOODMAN *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*when freehold is involved in proceeding to set aside lease as a cloud on title.* A freehold is involved in a proceeding to set aside a lease as a cloud on title where the lease provides for a term which may last for an indefinite period, the term stated being for ten years, "and as much longer as said premises produce minerals of any kind in paying quantities."

2. LEASES—*when a lease is properly set aside as obtained by fraud.* A lease giving the right to take minerals upon royalties is properly set aside as obtained by fraud where it is without mutuality, and the evidence shows that the lessees falsely represented themselves as trustees of persons having large capital, who would build a large plant on the land; that they were, in fact, trustees for no one and were without means, and that they never did anything under the lease, except to make a few tests, for some six years, when they assigned it for a nominal consideration.

APPEAL from the Circuit Court of Union county; the Hon. A. W. LEWIS, Judge, presiding.

D. W. KARRAKER, for appellants.

A. NEY SESSIONS, and JAMES LINGLE, for appellee.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

Appellee filed a bill in the circuit court of Union county to set aside and declare null and void a certain lease and assignment thereof as a cloud upon its title to certain real estate in that county. Appellants filed an answer to the bill as amended, and after the pleadings were settled a hearing was had before the chancellor and decree entered finding, among other things, that said lease was procured by fraud and circumvention, that it had been abandoned and forfeited before its assignment to appellant Goodman, and decreeing that said lease and assignment be set aside and

declared null and void against appellee and its successors and assigns as a cloud upon its title. From that decree this appeal was perfected.

The lease in question was executed November 25, 1902, by Margaret A. Keltner, of the first part, and J. Odenbaugh and H. T. Lee, trustees, of the second part. It was drawn up on a long-form printed lease, such as is often used in leasing coal or oil rights. It gave the parties of the second part exclusive right to dig, bore and otherwise prospect and mine for any and all kinds of valuable mineral substances on a certain eighty-acre tract of land in said Union county owned by Mrs. Keltner, for ten years, "and as much longer as said premises produce minerals of any kind in paying quantities," and the right to search, dig, bore, mine and excavate for said substances in as many places as they may deem proper and extract and remove the same, and provided they were not to sink shafts or pits within one hundred yards of any dwelling house on the premises. The lease stated that one dollar consideration had been paid, and that the parties of the second part should "commence and make search for said substances in and upon said demised premises within six months from the date hereof, and to render unto the party of the first part, her legal representatives or assigns, for each and every valuable mineral mined or produced and shipped from the premises, \* \* \* the following royalty, to be paid on the first day of each month, for all the minerals produced and shipped in the preceding period, to-wit: Mineral paint, ochre and oxides, per ton, fifty cents; clay, all kinds, per ton, fifty cents;" also a number of other minerals apparently printed in the form, the blanks for the amount of royalty not being filled out. There was a further provision that the parties of the second part could at any time remove any buildings, machinery or materials they had placed thereon, and could cancel the lease by giving written notice to the first party. The instrument was not under seal.

In 1902, and for many years prior thereto, Margaret A. Keltner, now deceased, owned in fee simple and occupied the premises here in controversy. The evidence tends to show that about five feet under the surface of all this land was a deposit of kaolin clay, running to a considerable depth. Her husband in his lifetime mined this clay, and after his death she continued to mine it in a rather primitive manner and market it. She had very little other property except this eighty acres, and no sources of income except from the sale of the clay and little assistance in getting a living except from her grandson, William R. Keltner, who after his marriage lived with his family on the premises close to her. But few of the eighty acres were cultivated, and all of the tract appears to have been rough and unprofitable for agricultural purposes. In November, 1902, Odenbaugh and Lee came from Ohio, claiming that they were trustees of persons having considerable capital who wanted to lease the land and put in a large manufacturing plant that would handle one hundred tons a day. The lease was prepared by Lee on a long printed form. Mrs. Keltner said she could not read the small type in which it was printed, and it was read over by Lee in her presence. One of the witnesses, Hawkins, testified he was present, and that Lee, while pretending to read the same, read as a part of it "that if they did not have machinery on the ground and be mining clay in paying quantities within six months that this lease is forfeited." Mrs. Keltner signed the lease and acknowledged it before a notary public who was brought there by Lee. Odenbaugh left Illinois immediately after the execution of the instrument, while Lee stayed something over a week and took seven or eight barrels of clay from the land. After digging this clay nothing further was heard from Lee and Odenbaugh until 1908 and their whereabouts appears to have been unknown to Mrs. Keltner. From the time the lease was executed she mined clay on the eighty acres with the assistance of her grand-

son, William R. Keltner, and October 2, 1907, she deeded the property to him. Previous to that she had made a lease to Mullin Bros. for twenty-five years, permitting them to dig clay and pay her royalties. Mrs. Keltner died January 9, 1908. William R. Keltner and wife, on February 4, 1908, gave an option to Mullins Bros. to purchase the land for \$8000, and on April 13, 1908, conveyed the property for that consideration by warranty deed. On the same day the Mullins conveyed the property to A. A. Fasig and Mary A. Perrine for \$15,000, and thereafter, August 12, 1908, the last named persons conveyed the land to appellee. The evidence shows that appellee has expended about \$60,000 in buildings and machinery for the purpose of digging clay. The lease to Odenbaugh and Lee was assigned by them to appellant Goodman for a nominal consideration the last of February or the first of March, 1908. As the term provided for by the lease might last for an indefinite and undetermined period, a freehold was involved and the case was rightly brought directly to this court. *Bruner v. Hicks*, 230 Ill. 536.

If the construction of this contract contended for by the appellants is correct, it was, as alleged in the amended bill, lacking in mutuality. Lee and Odenbaugh, who testified on the trial, while contending that they had not abandoned the contract, admitted that they had not done anything to carry out its provisions except to make a few tests shortly after it was executed. It is evident from this record that the contract was purely speculative on their part, and that by its terms it bound them to do nothing except to make these tests. Under the holdings of this court in *Cortelyou v. Barnsdall*, 236 Ill. 138, and *Bruner v. Hicks*, *supra*, the lease must be held to be lacking in mutuality and not capable of being enforced. Furthermore, it was such a contract as Mrs. Keltner, situated as she was, if she had fully understood its terms and was possessed of her senses, would not have executed. She could not compel Lee and

Odenbaugh to do anything under it. All of the circumstances surrounding the transaction tend to support the testimony of the witness Hawkins that Lee, in reading the contract, stated that it provided that he and Odenbaugh should have their machinery on the ground and begin work a short time after the contract was executed.

It is argued that Lee and Odenbaugh have both testified that they did not misrepresent anything, and that therefore the weight of the testimony did not uphold the finding of the court that fraud had been perpetrated upon Mrs. Keltner in obtaining her signature. They were not trustees for anyone, did not represent any capital and were without means. In *Bryant v. Simoneau*, 51 Ill. 324, this court, in discussing the question of fraud, said (p. 327): "It is urged that fraud must be proved and not inferred. This is true, but, like all other facts, it may be proved by circumstances. We should seldom, if ever, expect to prove fraud by the admissions of a party, nor should we expect to find direct and positive evidence of the fact. Whatever circumstances, when proven, convince the mind that the fraud charged has been perpetrated is all that is required." (*Schumacher v. Bell*, 164 Ill. 181; *Mortimer v. McMullen*, 202 id. 413; *Vollenweider v. Vollenweider*, 216 id. 197.) This lease is so unconscionable and so unreasonable, if construed as contended for by appellants, that the trial court was justified in holding that Mrs. Keltner was led to execute it through fraud.

Appellants Lee and Odenbaugh claim no interest in the contract. Appellant Thomas B. Goodman owns land near that here in question and has been engaged for years in mining the same kind of clay. When he found that appellee had made arrangements to purchase this property he hunted up Lee and Odenbaugh and obtained an assignment of their lease.

The decree of the circuit court will be affirmed.

*Decree affirmed.*



THE PEOPLE *ex rel.* Frank C. Vaughan, County Collector,  
Defendant in Error, *vs.* JOSEPHINE E. SARGENT *et al.*  
Plaintiffs in Error.

*Opinion filed December 21, 1911.*

1. SPECIAL ASSESSMENTS—*if inspection of record shows court was without jurisdiction its finding as to jurisdiction is overcome.* If an inspection of the record in the confirmation proceeding discloses that the court was without jurisdiction to confirm the assessment its finding that it had jurisdiction is overcome.

2. SAME—*when recital of jurisdiction is overcome.* The statute requires that the proof that notices were mailed at least fifteen days before the hearing shall be made by filing an affidavit, and, as such affidavit is in the nature of process and equivalent to an officer's return of a summons, an affirmative showing therein that the notices were mailed less than fifteen days before the hearing overcomes the finding of the court that it had jurisdiction and shows a want of jurisdiction to confirm the assessment. (*Dickey v. People*, 160 Ill. 633, distinguished.)

3. SAME—*when a presumption that court heard other evidence than affidavit is unwarranted.* Where the finding of the county court that it had jurisdiction of a special assessment proceeding is based upon the affidavit of mailing notices "filed herein," a presumption that the court heard other evidence as to the time the notices were mailed is unwarranted.

WRIT OF ERROR to the County Court of Lee county;  
the Hon. ROBERT H. SCOTT, Judge, presiding.

HENRY C. WARNER, BROOKS & BROOKS, and DIXON &  
DIXON, for plaintiffs in error.

HARRY EDWARDS, State's Attorney, and MARK C. KELLER, City Attorney, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

An application was made at the June term, 1911, of the county court of Lee county for a judgment against the lands of plaintiffs in error for the non-payment of the first

installment of a special assessment levied under the Local Improvement act by the city of Dixon, Illinois. Plaintiffs in error objected to the entry of judgment on the ground that the court was without jurisdiction to confirm the assessment roll. The objection was overruled and judgment entered. A writ of error has been sued out of this court to review that judgment.

Plaintiffs in error contend that fifteen days' notice of the time and place at which application would be made for the confirmation of the assessment roll was not given, as required by sections 41 and 44 of the Local Improvement act. The judgment of confirmation recites that a good and sufficient affidavit of mailing notices and a good and sufficient affidavit of posting notices "have been filed herein," which are approved, and the court finds that the law has been complied with as to mailing, posting and publishing notice of the application for confirmation and that the court has jurisdiction of the parties and of the subject matter. The certificate of publication states that notice was published daily for five successive days, the date of the first publication being the 29th day of June and the date of the last, July 5, 1909. The affidavit filed by the commissioner who spread the assessment states that he mailed notices to the property owners on June 29, and on July 1 posted notices at eight different places in the neighborhood of the proposed improvement. The time fixed for the hearing was July 2, at which time the hearing was continued until July 12, when judgment was entered. It will be seen that less than fifteen days intervened from the time of the first publication until the time of the hearing, and that the notices were also mailed and posted less than fifteen days before the hearing.

Defendant in error makes no claim that notice was given in compliance with the statute, but contends that the finding of the court that the law had been fully complied with as to mailing, posting and publishing notices, and that was

court had jurisdiction both of the parties and of the subject matter, is conclusive when attacked in a collateral proceeding. If an inspection of the record in the confirmation proceeding discloses that the court was without jurisdiction, its finding that it had jurisdiction is overcome. This court has frequently held that a certificate of publication of a notice in a newspaper which was defective in failing to show its publication in accordance with the requirements of law was not sufficient to overcome the finding of the court, in its judgment, that it had jurisdiction. (*Illinois Central Railroad Co. v. People*, 189 Ill. 119; *Glover v. People*, 188 id. 576; *Casey v. People*, 165 id. 49.) Here, however, something more than notice by publication in a newspaper was required. Section 41 of the Local Improvement act requires notice of the intended application for confirmation to be sent by mail to each of the persons paying the taxes on the respective parcels of land the last preceding year, not less than fifteen days before the hearing. By the same section an affidavit is required to be filed before the hearing, showing the notice was given in compliance with the law. Section 44 provides for posting at least four notices in the neighborhood of the improvement fifteen days before the hearing, and for publishing notice in a newspaper for five successive days if a daily newspaper is published in the city, town or village. We find no provision in the statute as to how proof of posting and publishing the notice shall be made. If the record of the proof of posting and publishing the notice comes within the rule that it will not be permitted to overcome the recital in the judgment that the court had jurisdiction of the parties and subject matter, we do not think the record of the mailing of the notice comes within that rule. Without mailing notices fifteen days before the hearing on confirmation the court had no jurisdiction to confirm the assessment. Proof that notice had been mailed was required to be made by an affidavit. This was in the nature of process and equivalent to an officer's re-

turn of a summons. (*Michael v. City of Mattoon*, 172 Ill. 394.) The affidavit states that the notices were mailed on June 29, which was less than fifteen days before the hearing. This contradicts the finding of the court that due service was had, overcomes the finding and proves the want of jurisdiction. *Spring Creek Drainage District v. Highway Comrs.* 238 Ill. 521.

When *Dickey v. People*, 160 Ill. 633, and other cases in line with it, were decided, the statute was not the same as our present statute. The former statute merely required an affidavit, signed by one or more of the commissioners, to be filed before the date of the hearing, showing notices had been mailed to the owners, and this was made *prima facie* evidence of compliance with the statute. It was held that where the judgment recited that the notices had been mailed in accordance with the requirements of the law, the failure of the affidavit to state when the notices were mailed, or that they were mailed the length of time required before the hearing, would not overcome the recitals in the judgment, as the court might have heard other proof. Section 41 of the present Local Improvement act requires proof of mailing notices to be made by affidavit filed before the final hearing, "showing a compliance with the requirements of this section."

The recital in the judgment that the court had jurisdiction is based upon the proof of mailing notices, which proof is the affidavit of the commissioner "filed herein." This affidavit is a part of the record of the proceeding in the county court, and from it it clearly appears that the notices had not been mailed fifteen days before the judgment of confirmation was entered. In this state of the record we are of opinion a presumption that the court might have heard other proof as to the time the notices were mailed would be unwarranted. Notwithstanding the recital in the judgment of confirmation, the record shows the court was

without jurisdiction to confirm the assessment, and the county court erred in not sustaining plaintiffs in error's objection to the application for judgment and order of sale.

The judgment is therefore reversed and the cause remanded, with directions to the county court to sustain said objections.

*Reversed and remanded, with directions.*

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THE PEOPLE *ex rel.* City of Springfield, Appellee, *vs.*  
CHARLES H. EDMANDS, County Treasurer, Appellant.

*Opinion filed December 21, 1911.*

1. CONSTITUTIONAL LAW—*what constitutes the final passage of a bill.* Any action evidencing the intention to enact a bill into a law, where the vote is taken by yeas and nays and entered on the journal, is a final passage of the bill.

2. SAME—*when receding from amendments by a ye and nay vote is a final passage of the bill.* Where one house passes a bill and the other house amends it and passes it as amended, and afterwards recedes from the amendment by a vote taken by yeas and nays and entered on the journal, the vote to recede is a final passage of the bill without the amendments. (*People v. DeWolf*, 62 Ill. 253, distinguished.)

3. SAME—*Illinois Commission Form of Government act does not deprive voters at the primary of constitutional rights.* The Illinois Commission Form of Government act, (Laws of 1909-10, p. 12,) by not permitting a voter at the primary election to vote for more than one candidate for the nomination to the office of mayor nor for more than four candidates for the nomination to the office of commissioner, does not deprive the voter of any constitutional right, as he has no greater rights at the regular election than he has at the primary.

4. SAME—*Illinois Commission Form of Government act is not invalid as a special or local law.* The Illinois Commission Form of Government act (Laws of 1909-10, p. 12,) is not invalid, as a special or local law affecting the incorporation of villages, cities and towns, because of the provision that it is only to become effective in municipalities which may adopt it by vote, nor because the people, by vote, may cease to act under it; nor is it invalid

because it can only be adopted by cities having a population of not exceeding 200,000.

5. SAME—*a classification based upon substantial differences in population is valid.* A classification of municipal corporations based upon substantial differences in population and the necessity for different officers and different powers is valid, as it was not intended by the provision of the constitution against special or local laws concerning the organization of cities, towns and villages, that every hamlet or village should have the same organization, or even the same officers and powers, as the largest cities.

6. SAME—*Federal guaranty of republican form of government does not extend to municipal corporations.* The Illinois Commission Form of Government act (Laws of 1909-10, p. 12,) does not violate section 4 of article 4 of the Federal constitution, which provides that the United States shall guarantee to every State a republican form of government, as such provision applies only to the form of government of the State, and not to its regulation of affairs of minor municipalities or local subdivisions of the State.

7. SAME—*what not a violation of provision that no law shall be revived or amended by reference to its title, alone.* Where an act purports by its title to be an act to amend a specified general law by adding a certain article and sets out said article at length, and there is no change made in the general law except to add the article set out, there is no violation of the constitutional provision that no law shall be amended by reference to its title, alone.

8. MANDAMUS—*when officer is individually liable for costs of a proceeding against him.* A public officer who represents no one but himself in refusing to perform a duty enjoined upon him by law is personally and individually liable for the costs in a *mandamus* proceeding to compel him to perform such duty.

VICKERS, FARMER and COOKE, JJ., dissenting.

APPEAL from the Circuit Court of Sangamon county;  
the Hon. JAMES A. CREIGHTON, Judge, presiding.

EDMUND BURKE, State's Attorney, A. SALZENSTEIN,  
THOMAS F. FERNS, and CLAYTON J. BARBER, for appellant:

The manner in which a bill is passed must be shown upon the face of the journal of each house. Const. art. 4, sec. 12; *People v. Knopf*, 198 Ill. 340; *Cook County v. Healy*, 222 id. 310; *Spangler v. Jacoby*, 14 id. 297.

The senate having struck out all the house bill as passed by the house after the enacting clause, and never having affirmatively voted upon the bill, did not legally pass it by voting to recede from its own bill. Const. art. 4, sec. 12; *People v. DeWolf*, 62 Ill. 253.

A statute limiting the right of the elector at a primary election to vote for a less number of candidates than are to be nominated restricts the constitutional right of the voter and renders the act unconstitutional and void. *Rouse v. Thompson*, 228 Ill. 522; *People v. Strassheim*, 240 id. 279; *People v. Deneen*, 247 id. 289; *State v. Considine*, 42 Ohio St. 437.

The General Assembly shall not pass local or special laws for "incorporating cities, towns or villages, or changing or amending the charter of any town, city or village." Const. art. 4, sec. 22, clause 10.

The purpose of this constitutional provision was to prevent the legislature from creating or perpetuating dissimilarity in the organization or powers of cities, in order that all the people in the State might know the powers and organization of each of the cities in the State. 1 Debates Const. Con. 1870, p. 591, *et seq.*; *People v. Cooper*, 83 Ill. 585; *Cummings v. Chicago*, 144 id. 565; *People v. Wilcox*, 237 id. 421.

An attempt was made in the constitutional convention to amend this clause so that special legislation could be effective by vote of the people of the city to be affected, and also to classify cities by population, with reference to special legislation. 1 Debates Const. Con. 1870, pp. 593, 604.

It is not competent for the legislature to create or perpetuate by law any dissimilarity in the character of organization or powers in municipalities of the same class or grade. *People v. Cooper*, 83 Ill. 585; *People v. Normal*, 170 id. 468.

The legislature cannot make classifications upon the ground of alleged differences in circumstances and condi-

tions unless they actually exist, nor can it put it beyond the power of the courts to determine whether such differences do exist. *Knopf v. People*, 185 Ill. 20.

A classification by population which makes it absolutely certain that but one city in the State will be excluded from the operation of the act must be regarded as a mere device to evade the constitutional provision which forbids special legislation. *Devine v. Cook County Comrs.* 84 Ill. 590.

As to what constitutes a republican form of government within the meaning of the constitutional provision, see 34 Cyc. 1622; *Minor v. Hofferst*, 21 Wall. 175; *Duncan v. McCall*, 139 U. S. 449; Andrews on American Law, 191; 1 Curtis' Const. History of United States, chap. 32.

The commission form of government for municipalities is contrary to the provision of the Federal constitution and the constitution of the State of Illinois providing for a republican form of government. *Ex parte Farnsworth*, 135 S. W. Rep. 535; *In re Pfahler*, 150 Cal. 71; *Ex parte Wall*, 48 id. 279; *Santo v. State*, 2 Iowa, 165.

Amendments or changes in the laws by implication, without reference to title or otherwise, are obnoxious to the constitution. *People v. Hartsig*, 249 Ill. 353; *Badenoch v. Chicago*, 222 id. 71.

It was error to render a personal judgment against respondent for costs. *People v. Madison County*, 125 Ill. 334.

FRANK L. HATCH, ANDRUS & TRUTTER, and STEVENS & HERNDON, for appellee:

The action of the senate in receding from its amendments was a final passage of the bill by that body, within the meaning of the constitution. *Robertson v. People*, 20 Colo. 279; *State v. Corbett*, 61 Ark. 226; *Division of Howard County*, 15 Kan. 194; *People v. Supervisors*, 8 N. Y. 317; *Nelson v. Haywood County*, 91 Tenn. 596; *People v. DelWolf*, 62 Ill. 253; 5 Hinds' Precedents, 668,



669, 672, 673; *People v. Loewenthal*, 93 Ill. 213; 36 Cyc. 955, 956.

It is common knowledge that it has been the practice of each branch of the legislature of this State to finally pass bills by receding from its amendments and by the adoption of reports of committees of conference. This continued and repeated practice lends great strength to an interpretation of the constitution favoring the authority of the General Assembly to enact the law in question in the manner it did. *Cook County v. Healy*, 222 Ill. 310; *State v. Gerhardt*, 145 Ind. 439; *Atwell v. Parker*, 93 Minn. 462; *Edwards v. Railroad Co.* 13 Colo. 59; *State v. Bryan*, 39 So. Rep. 929; *Johnson v. Great Falls*, 38 Mont. 369; *City Council v. Board of Comrs.* 77 Pac. Rep. 858; *Bunn v. People*, 45 Ill. 397.

The right of a voter to participate in the selection of candidates whose names will be placed on the official ballot is properly limited to the number of officers to be chosen at the election for which the primary is held. *People v. Election Comrs.* 221 Ill. 9; *Rouse v. Thompson*, 228 id. 522; *People v. Strassheim*, 240 id. 279; *People v. Deneen*, 247 id. 289.

An act general in its terms and uniform in its operation upon all persons and subject matter in like situation is a general law and not obnoxious to the objection that it is local or special legislation. *Hawthorn v. People*, 109 Ill. 302; *People v. Hazelwood*, 116 id. 319; *People v. Hoffman*, 116 id. 587; *Coal Co. v. Finlen*, 124 id. 666; *Park Comrs. v. McMullen*, 134 id. 170; *Cummings v. Chicago*, 144 id. 563; *People v. Martin*, 178 id. 611.

An act otherwise general is not rendered local or special by a provision that it shall operate only in such cities, villages and towns as may adopt it by vote, even though in practice it may result in similar municipalities being governed by dissimilar methods. *Chicago v. People*, 80 Ill. 496; *Potwin v. Johnson*, 180 id. 70; *People v. Hoffman*,

116 id. 587; *People v. Kipley*, 171 id. 44; *People v. Simon*, 176 id. 166.

The provision of the Commission Form of Government act allowing cities having adopted it to abandon such organization and return to the provisions of the act of 1872 is not in conflict with the constitution. *People v. McBride*, 234 Ill. 146.

Section 4 of article 4 of the constitution of the United States, which guarantees to every State a republican form of government, does not apply to municipalities created by States. *People v. Loeffler*, 175 Ill. 585; *In re Pfahler*, 150 Cal. 71; *Eckerson v. DesMoines*, 137 Iowa, 452; *Claiborne Co. v. Brooks*, 111 U. S. 400; *Forsythe v. Hammond*, 166 id. 506; *Williams v. Eggleston*, 170 id. 304; *Hopkins v. Duluth*, 81 Minn. 189; *Rushton v. Handley*, 115 Pac. Rep. 56; *Mayor v. Oil and Gas Co.* 115 id. 353; *Telegraph Co. v. Dallas*, 131 S. W. Rep. 80; *Brown v. Galveston*, 97 Tex. 1.

Municipal corporations are solely and purely creatures of the legislature, and the State constitution containing no restrictions on that body as to their form of government, the legislature may provide such form as it deems best. *True v. Davis*, 133 Ill. 522; *People v. Kipley*, 171 id. 44; *People v. Loeffler*, 175 id. 585; *People v. McBride*, 234 id. 172; *People v. Bowman*, 247 id. 276; *People v. Provines*, 34 Cal. 520; *Eckerson v. DesMoines*, 137 Iowa, 452; *Railroad Co. v. Whiting*, 161 Ind. 228; *State v. Wagner*, 170 id. 144.

The so-called initiative and referendum, as provided for in the act, is within the meaning of the term "republican form of government," as used in the constitution of the United States. *Kaddery v. Portland*, 44 Ore. 118; *Kiernan v. Portland*, 111 Pac. Rep. 379; *Oregon v. Telegraph Co.* 53 Ore. 162; *Eckerson v. DesMoines*, 137 Iowa, 452; *Ex parte Wagner*, 21 Okla. 33; *Bonner v. Belsterling*, 138 S. W. Rep. 571; *Telegraph Co. v. Dallas*, 134 id. 321;

*In re Pfahler*, 150 Cal. 71; Cooley's Const. Lim. (7th ed.) 42, 45; 2 Story on the Constitution, (5th ed.) sec. 1815; Black on Const. Law, 309, 310.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This proceeding for *mandamus* was begun in the circuit court of Sangamon county to test the constitutionality of the act passed by the Forty-sixth General Assembly authorizing the adoption of what is commonly known as the commission form of city government. (Laws of 1909-10, p. 12.) The city of Springfield was the relator, and the petition alleged that William H. Bowe was elected by the mayor and commissioners, organized as the city council, to the office of city treasurer, and that he qualified and demanded from appellant, Charles H. Edmands, Jr., county treasurer of said county, the amount of taxes and special assessments due to the city, which demand the appellant refused to comply with. The answer admitted the election of Bowe and that he qualified, and it justified the refusal to pay over the money of the city to him by alleging that the act never became a law because not enacted in accordance with the constitution, and that it was void because repugnant to the constitution of this State and the constitution of the United States. The relator demurred to the answer, and the appellant moved that the demurrer be carried back to the petition. The motion was denied and the demurrer sustained. The appellant excepted to the denial of the motion and sustaining of the demurrer and elected to stand by the amended answer, whereupon a judgment was entered awarding the peremptory writ, and this appeal was taken.

Section 12 of article 4 of the constitution contains the provision that "on the final passage of all bills the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of the majority of the members

elected to each house." The method by which the act in question was passed is stated in the answer as follows: The bill for the act was passed by the house of representatives, as required by the constitution, and was transmitted to the senate, where it was referred to the committee on municipalities. It was reported to the senate as House Bill No. 43, and was read at large the first time before reference to the committee. On the same day the committee reported the bill back with amendments thereto, and recommended that the amendments be adopted and that the bill as amended do pass. The amendment consisted of striking out all after the enacting clause and inserting in lieu thereof a bill which was substantially the same but with minor changes and some additions and omissions. The bill, when it passed the house, contained more than sixty sections, and the action of the senate committee amounted to re-drafting the bill with the amendments. The report of the committee was adopted and the bill as amended was ordered to a third reading and the amendment printed. Afterward, the bill, still designated as House Bill No. 43, having been printed, was taken up and read at large a third time, and the question being, "Shall this bill pass, together with the senate amendments thereto?" it was decided in the affirmative by a vote of yeas 34, nays 1. A message was sent to the house informing the house that the senate had concurred with it in the passage of House Bill No. 43 with an amendment thereto, in the adoption of which amendment the concurrence of the house was asked. The house refused to concur with the senate in the adoption of its amendment to the bill and notified the senate of the refusal. A conference committee was appointed by both houses, which reported, recommending that the senate recede from its amendments and recommending the passage of the bill as reported from the house, with four amendments set forth in the report. The report was rejected by both house and senate. The house appointed members for

a new conference committee and notified the senate, but the senate refused to appoint members of a second committee, and on motion that the senate recede from its amendments to House Bill No. 43 the yeas and nays were called, and the question was decided in the affirmative by a vote of yeas 30, nays 2, entered on the journal in accordance with the constitution. The president of the senate thereupon announced that House Bill No. 43 (giving the title of the bill) had passed the senate without any amendments, and the secretary was instructed to notify the house of representatives of the action of the senate.

The constitution does not prescribe any form of procedure for the final passage of a bill other than the requirement of said section 12, and the view of the courts has been that any action evidencing the intention to enact a bill into a law, where the vote is taken by yeas and nays and entered on the journal, is a final passage of the bill. The senate had voted for the bill with the amendments, and by the second vote, taken in the manner required by the constitution, removed the amendments, leaving the bill as passed by the house. It is argued that it did not follow that the senate assented to the bill as passed by the house, but that such was the intention and understanding and that the vote receding from the amendment was intended as a final passage of the bill before it was amended there can be no doubt. Under similar provisions of the constitutions of other States it has been held, wherever the question has arisen, that if one house passes a bill and the other house amends it and passes it as amended and afterwards recedes from the amendments, and the vote is taken by yeas and nays and entered upon the journal, such vote is a final passage of the bill without the amendments. (*Robertson v. People*, 20 Colo. 279; *Division of Howard County*, 15 Kan. 194; *People v. Supervisors*, 8 N. Y. 317; *State v. Corbett*, 61 Ark. 226; *Nelson v. Haywood County*, 91 Tenn. 596.) These cases show a quite general understanding among leg-

islative bodies that a vote by one house receding from amendments made by it to a bill of the other house which has been passed by it as amended is a passage of the bill in its original form as passed by the other house, and such is the rule and practice in Congress. (5 Hinds' Precedents of House of Representatives, 668-672.) Counsel regard the case of *People v. DeWolf*, 62 Ill. 253, as stating a different rule. In that case a bill for an act to increase the jurisdiction of justices of the peace was passed in the house and amended in the senate and as amended was passed by a constitutional majority on the call of the yeas and nays. The house refused to concur in the amendment, and the senate, by a vote of the majority of a quorum less than a majority of all the members elected, receded from the amendment. This court stated the question to be decided, as follows: "The question is, to what did a constitutional majority of the senate give their assent?" and the court answered that it was to increase the jurisdiction of justices of the peace, coupled with a corresponding increase of their official bonds provided for by the amendment, and the constitutional majority never assented to the increase of jurisdiction without the increase of the official bonds. It was not held that receding from the amendment by a vote taken as required by the constitution would not have been a final passage of the bill, and the question here considered was not involved in any manner. The constitution was complied with in the passage of the act.

It is contended that the act deprives the voter of his constitutional right by not permitting him to vote at the primary election for more than one candidate for mayor although two are to be nominated, nor more than four candidates for commissioner although eight are to be nominated. Counsel call attention to the decision in *Rouse v. Thompson*, 228 Ill. 522, and other cases holding that the right to choose candidates for public office whose names will be placed upon the official ballot is of the same nature

as the right to vote for them after they are chosen, and that any law regulating primary elections must not curtail, subvert or restrict such rights. It does not appear to be claimed that a voter at the regular election would have a right to vote for two candidates for mayor and eight candidates for commissioner. What was held in those cases was, that a voter has a right to vote for as many candidates at a primary election as he can vote for at the regular election, and by this act he is given that right and can vote for as many candidates as he could vote for when the regular election takes place.

It is next insisted that the act violates section 22 of article 4 of the constitution, which prohibits special or local legislation in matters affecting the incorporation of villages, cities and towns. It does not violate that section because of the provision that it is only to become effective in municipalities which may adopt it by a vote. (*People v. Hoffman*, 116 Ill. 587; *People v. Kiplecy*, 171 id. 44.) If the law is not obnoxious to the constitution because it only operates where adopted, it cannot be objectionable because the people by a vote may cease to act under it. Another reason given is, that the city of Chicago is arbitrarily excluded by the provision that the act can only be adopted by cities having a population of not exceeding 200,000. The constitution does not require that every hamlet or village shall have the same organization, or even the same officers and powers, as the largest cities. It was not intended by the constitution to effect that object and classification based upon substantial differences in population, and the necessity for different officers and different powers has been recognized as valid. *Cummings v. City of Chicago*, 144 Ill. 563.

The next objection to the act is that it violates section 4 of article 4 of the constitution of the United States, which provides that the United States shall guarantee to every State in the Union a republican form of government. That provision applies only to the form of government of the

State, and not to its regulation of affairs of minor municipalities or local subdivisions of the State. (Cooley's Const. Lim. 28.) It has never been supposed that holding a town meeting, where the voters assemble and make their own regulations of township affairs according to the form and plan of a pure democracy, is a violation of the constitution of the United States. Local affairs were regulated in that manner in New England when the constitution was adopted, and the same method has existed in this State for a long time without question. If the provisions for the initiative, referendum and recall do not come within the accepted definition of a republican form of government the act is not therefore rendered invalid by the constitution of the United States, because the provision of that constitution relates only to State government.

The next proposition of counsel is that the act violates section 13 of article 4 of the constitution of this State, which provides that no law shall be revived or amended by reference to its title alone, but the law revived or section amended shall be inserted at length in the new act. No law was revived by this act, which by its title purported to amend the general act providing for the incorporation of cities and villages by adding thereto article 13. The article added was printed at length, and as no change was made in the act except by adding the article, the constitutional provision was not violated.

Finally, it is urged that the trial court erred in rendering a personal judgment against the defendant for costs. By express provision of section 5 of the Mandamus act the relator was entitled to recover its costs, and the fact that appellant was an officer did not exempt him. (*County of Pike v. People*, 11 Ill. 202.) There are cases where proceedings are begun and prosecuted by public officers in their official character, in behalf of the public, where the judgment should be against them for costs in their official capacity, and the case of *People v. Madison County*, 125 Ill.



334, was of that nature. The defendant represented no one but himself in refusing to perform a duty enjoined upon him by law, and he was personally and individually liable for costs.

The judgment is affirmed.

*Judgment affirmed.*

VICKERS, FARMER and COOKE, JJ., dissenting:

We do not concur with the majority opinion in its conclusion that the act providing for a commission form of government was passed in a constitutional manner by the legislature. The journals of the two houses show that this bill, known as House Bill No. 43, was introduced in and passed by the house and reported to the senate and there referred to the committee on municipalities. That committee amended the house bill by striking out all of the bill after the enacting clause and substituted in lieu thereof another bill, and that action of the committee was approved and the substituted bill passed by the senate. At the time the senate voted to pass the bill not a single section of House Bill No. 43 was before the senate as a house bill, but every line and every section for which the senate voted was matter substituted by the senate and its committee for the house bill. Having stricken out all of the house bill after the enacting clause, it seems unreasonable to hold that a vote for the substituted bill was a passage of the bill that had been bodily stricken out by way of amendment.

We do not think that the cases relied upon in support of the majority opinion are applicable to a situation such as is shown by the journals of the two houses in this case. The case of *Robertson v. People*, 20 Colo. 279, presented an entirely different question from the one involved here. In that case a bill for an act providing for the punishment of persons receiving deposits in a bank with the knowledge of its insolvency was introduced in the senate and regularly passed, and while pending in the house was amended

by adding a section, and the senate bill, with the section added by way of amendment, was regularly passed by the house. Upon its return to the senate that body refused to concur in the house amendment, and thereupon a committee of conference was appointed by the two houses, which recommended that the house recede from its amendment. Upon consideration of this report by the house, the question being, "Shall the house recede from the amendment and adopt the report of the committee?" the yeas and nays were called and entered upon the journal, and a constitutional majority having voted in the affirmative the report was adopted. The Supreme Court held that when the house receded from its former vote upon the amendment the bill was then left in the same form in which it had passed the senate, and both houses having thus agreed upon the same measure, the bill was passed in accordance with the requirements of the constitution. The difference between the Colorado case and the case at bar is both clear and substantial. In the Colorado case the house voted for every section of the senate bill in the identical form in which it passed the senate and at the same time for an additional section that had been added to the senate bill in the house. Receding from the vote by which the additional section was added manifestly could have no effect upon the affirmative vote for the other sections that had passed the house. Receding from the amendment under those circumstances amounted merely to a vote in the house to strike out one section which had been added in the house, leaving the balance of the bill intact.

The case of *State v. Corbett*, 61 Ark. 226, presents precisely the situation as the Colorado case. A bill had passed one branch of the legislature and afterwards it was amended in the other house and passed as amended, and subsequently the house receded from the amendments, leaving the bill as it had passed the other house. The vote by which the amendments were receded from was not a yea

and nay vote, and this was urged as an objection to the validity of the law. The Supreme Court held that it was not necessary that the vote upon a motion to recede from an amendment should be taken by yeas and nays and entered upon the journal, and this holding is supported by the New York case cited in the majority opinion. *People v. Supervisors of Chenango*, 8 N. Y. 317.

The other cases cited in the majority opinion are in line with the Colorado and Arkansas cases above referred to. None of these cases present the question that is involved in this case and therefore lend no support to the conclusion reached by the majority opinion. It is no answer, in our judgment, to this argument to say that there was a general correspondence between the substituted senate bill and the original house bill. When the senate struck out all of the house bill after the enacting clause there was nothing left. The house bill, by that vote and the substitution of another bill in its place, was no longer before the senate. Whatever was before the senate to be voted upon was a substituted bill, and it was for the substituted bill, only, that the senate voted. When the senate passed its substituted bill it did not pass the bill that had been stricken out, but it passed the bill that had been substituted therefor. The only way that the senate could have constitutionally passed the house bill would have been to first recede from the vote by which the substitute was adopted, then re-instate the house bill and pass it in the regular constitutional manner. No attempt was made to do anything of this kind. In our opinion this bill never became a law.

We have not considered any constitutional objections to this act upon the assumption that it was regularly enacted, and we express no opinion upon those questions.

ARNOLD HOLINGER, Trustee, *et al.* vs. HARRIET E. DICKINSON *et al.* Appellees.—(JULIUS STICHERT, Appellant.)

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*a freehold does not include the mere right to that which in equity will entitle a party to freehold.* A freehold, as that word is used in the statute authorizing an appeal directly to the Supreme Court, does not include the mere right to do that which in equity would entitle a party to a freehold.

2. SAME—*freehold is not involved in a proceeding to foreclose a mortgage or for accounting.* A freehold is not involved in a proceeding to foreclose a mortgage or to have a deed declared a mortgage and permit redemption, or to require an accounting and compel a conveyance upon payment of the amount found due.

3. SAME—*when issue made by cross-bill does not involve freehold.* A freehold is not involved where a cross-bill is filed in a foreclosure proceeding, alleging that the cross-complainant had purchased the property on the installment plan under a verbal contract with the mortgagor, that he had made improvements and paid the purchase money due and praying that the said contract be established and enforced, and, if anything be found due on the hearing, that the parties holding or claiming title be required to join with the cross-complainant in re-mortgaging the premises for that amount, and that said amount be paid to satisfy the mortgage debt and credited upon the contract of purchase.

APPEAL from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

G. W. SPUNNER, and HAYDEN N. BELL, for appellant.

BENSON LANDON, for appellees.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

May 15, 1911, Arnold Holinger, as trustee, and Louis E. Chipman, filed a bill to foreclose a trust deed on certain premises in Chicago. The bill alleged that on April 11, 1906, Harriet E. and Arthur W. Dickinson executed their note for \$1700, due five years after date, with inter-

est, and secured said note by a trust deed to Arnold Holinger, as trustee, on the property here in question; that for a valuable consideration, paid before maturity, the said note and interest notes had become the property of said Chipman; that default had been made in the payment of interest, and there was then due in principal and interest \$1539.74. The bill included among the defendants Julius Stichert and Anna Stichert, alleging that they claimed some interest in said premises subsequent to the lien of the trust deed. Said Sticherts thereafter answered, and Julius Stichert also filed a cross-bill. It is alleged by them that on November 24, 1906, Julius Stichert made a verbal contract with Arthur W. Dickinson to purchase said real estate for \$3200, payable \$100 down and \$25 monthly thereafter, with interest; that in pursuance of said contract Stichert had taken possession of the premises, made improvements costing more than \$290, and paid all the purchase money due under the contract up to May 1, 1911; that on May 17, 1911, he had tendered Louis E. Chipman, as the authorized collector for Dickinson, the amount then due under said contract, but that Chipman refused the tender and stated that new arrangements had been made and no further payments would be received; that Stichert had done carpenter work for Dickinson in excess of \$600, which it was his understanding was to apply on the contract; that Dickinson and Chipman had fraudulently entered into an agreement to foreclose the said trust deed to defeat the rights of Stichert; that said notes had been fully paid and had been fraudulently transferred to said Chipman. The cross-bill prayed that said contract be established and enforced, and if it was shown on a hearing that said Chipman was not the *bona fide* owner of said notes or that they had been paid they be canceled, and if it be established that said notes were still due and that Chipman was the *bona fide* holder, said Dickinson and wife, and any others who claimed title to said premises, be required to join with cross-complainant

and his wife in mortgaging said premises for a sufficient amount to pay said note, upon the usual terms as to time, interest, etc., or that cross-complainant be permitted to pay said notes, and that the amount so taken up by new mortgage or paid by the cross-complainant be credited upon the contract. Appellees filed a demurrer to the said cross-bill, which was sustained on a hearing, the decree finding that the cross-bill was not germane to the original bill. The cross-complainant elected to stand by his cross-bill, whereupon it was dismissed and a decree entered foreclosing the trust deed. From that decree this appeal was prayed, the only error assigned being that the trial court erred in sustaining the demurrer to the cross-bill.

The first question presented is whether a freehold is involved in this proceeding so as to authorize the bringing of the case directly to this court. We have repeatedly held that a freehold is not involved in a bill to foreclose a mortgage. (*Reagan v. Hooley*, 247 Ill. 430, and cases cited.) We have also held that a freehold is not involved in a bill to have a deed declared a mortgage and to permit redemption, (*Eddleman v. Fasig*, 218 Ill. 340,) or in a bill to require an accounting and compel the conveyance of property upon the payment of the amount due. (*Schoendubee v. International Building Loan and Investment Union*, 183 Ill. 139.) The fact that the cross-bill prays that on certain conditions being carried out appellees be compelled to convey the property does not determine that a freehold is involved. Even if the prayer of the cross-bill had been sustained and decree entered accordingly, until appellant had made the required payments he would not have been entitled, in equity, to a deed. (*Burroughs v. Kotz*, 226 Ill. 40.) Appellant might or might not avail himself of the right of making the payments. A freehold, as that word is used in the statute authorizing an appeal directly to this court, does not include the mere right to do that "which

in equity will entitle a party to a freehold." (*Kirchoff v. Union Mutual Life Ins. Co.* 128 Ill. 199.) The principal question involved in this proceeding is as to whether the allegations of the bill are true and the decree foreclosing the trust deed was properly entered. There is no dispute in the record over the title to the land. A freehold is not directly involved in this proceeding. The authorities cited by appellant on this question do not hold otherwise.

This court being without jurisdiction, the cause will be transferred to the Appellate Court for the First District. The clerk of this court will transmit all the files of the case, together with the order transferring the same.

*Cause transferred.*

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THE TOWN OF CROOKED CREEK, Appellee, *vs.* EMMA KING  
*et al.* Appellants.

*Opinion filed December 21, 1911.*

1. PARTIES—*highway commissioners may sue in name of town to enjoin obstruction of ditch draining highway.* A suit to enjoin the obstruction of a ditch which drains the highway may be properly brought by the highway commissioners in the name of the town, in absence of any provision in the statute to the contrary.

2. DRAINAGE—*when a ditch carrying waters from highway is within the act of 1889.* Where a land owner constructs a ditch across his land up to the limits of a highway, and at his request the highway commissioners connect their ditch with his, so as to carry the water from the highway through the land, such ditch is within the act of 1889 concerning ditches constructed by mutual agreement and consent, and neither the land owner nor his grantee has a right to destroy the ditch against the will of commissioners.

3. SAME—*record by commissioners showing agreement to construct a ditch is not necessary.* Proof of an agreement between highway commissioners and a land owner whereby the commissioners connected a ditch with one constructed by the land owner may be made, even though there is no record made by the commissioners of such agreement. (*People v. Madison County*, 125 Ill. 334, distinguished.)

APPEAL from the Circuit Court of Cumberland county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding.

JOHN J. ARNEY, FRED J. BARTLETT, and JAMES W. & EDWARD C. CRAIG, for appellants.

BREWER & BREWER, and ISLEY & WILLIAMS, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

The bill in this case was filed in the name of the town of Crooked Creek, Cumberland county, by its commissioners of highways. It alleged that there is, and has been for more than twenty years, a public highway open for public travel north and south along the east side of the south-west quarter of the north-west quarter of section 22, in said town; that Emma King is the owner of said tract of land and that it is controlled by her and her husband, William King; that Emma King acquired title to the said land by conveyance from her father, James McBride; that while James McBride was the owner, and more than twenty years before the commencement of this suit, he entered into an agreement with the commissioners of highways of the town of Crooked Creek for the construction of a ditch from said highway upon and across said land; that there was at the time of the said agreement a ravine or draw extending in a north-easterly and south-westerly direction across the said tract of land, and in order that the adjoining lands and said highway and the McBride land might be better drained and the water diverted to the nearest natural outlet, the ditch was constructed by the mutual consent and agreement of the parties; that it has ever since been open until in April, 1910, when Emma King and William King caused its obstruction where it leaves the highway and enters Emma King's land, by filling it with dirt, posts and other material. The bill alleges that defendants had been



notified to remove said obstruction but refused to do so; that the commissioners of highways removed said obstruction once, but the defendants placed another and more effective obstruction in the ditch at the same point. The bill prays that defendants be required to remove the obstruction and that they be enjoined from preventing or obstructing the flow of water through the said ditch and from interfering in any manner with the right of complainant in said ditch or the right to drain the water through it. Defendants demurred to the bill but the demurrer was overruled, and they answered denying the construction of the ditch by agreement, as alleged in the bill, and generally denying the material averments of the bill. After the evidence was heard, defendants asked leave to amend their answer by setting up and relying on sections 13 and 14 of article 2 of the constitution of Illinois and the fifth amendment to the constitution of the United States. The amendment also set up that there was an adequate remedy at law, and that in October, 1910, the commissioners of highways constructed a new ditch upon defendants' land about three feet south of where the old ditch had been. The court refused to permit the filing of this amendment. Appellants also filed a cross-bill, alleging, among other things, that the commissioners had collected large quantities of water from contiguous lands in the ditches constructed along the public highway; that they had constructed a levee or embankment across one of the ditches, closing it up, and thereby caused the water to run and flow upon the land of appellant Emma King in greatly increased quantities, thus preventing its flow southwardly, as it naturally would do in the absence of said obstruction. The cross-bill prays that the commissioners of highways be ordered and directed to remove said embankment from said ditch and open said ditch up, and that they be enjoined from interfering with the flow of water through said ditches in said highway and from discharging any water upon the land of the cross-

complainant Emma King. The appellee demurred to the cross-bill, a special ground of demurrer being that it was not germane to the original bill but sought to bring before the court other and distinct matters from those alleged in the original bill. The court sustained the demurrer and dismissed the cross-bill. The cause was heard upon the original bill, answer and replication and a decree was entered in accordance with the prayer of the original bill. This appeal is prosecuted from that decree.

The exact situation of the land and the highway is not clear from the record. The bill alleges, and the decree finds, that the highway is on the east side of the land. The bill also alleges that a draw extends north-east and south-west in the land and that the water flows in a south-west-erly direction. The answer and cross-bill allege that the highway is on the west side of the land. We are unable to find that any witness who testified in the case stated where the road was located with reference to the land. Whether the road is on the east or west side of the land is not material to a decision of the case, but we have assumed that its location is correctly described in the bill and the decree.

The appellants contend that this suit should have been brought by and in the name of the commissioners of highways. Section 1 of article 5 of the Township Organization act authorizes a suit at law or in equity for the settlement of any controversy that may arise between a town and any individual or corporation, such suit to be conducted in the same manner and the judgment or decree to have like effect as in suits or proceedings between individuals and corporations. Section 2 provides, that "in all such suits or proceedings the town shall sue and be sued by its name, except where town officers shall be authorized by law to sue in their name of office for the benefit of the town." Certain actions are authorized to be brought by the commissioners of highways in their name by section 74 of the

Road and Bridge act, but not actions of this character. Certain actions are authorized to be brought in the name of the town by the commissioners and certain other actions in the name of the town by the supervisor, but suits of the character here involved are not specifically included in any of those provisions. There can be no question that the bill states a case for which the town has a right of action. We find no provision of the statute as to who shall bring the suit, but the authority to do so must rest in someone. The public highways and ditches of the town are under the control and jurisdiction of the commissioners of highways, and in the absence of any provision to the contrary, the duty and authority to bring the necessary actions in the name of the town for the preservation of the public highways and ditches rest upon the commissioners.

In their briefs counsel have discussed the existence of the ditch in controversy by prescription, by dedication, and by mutual license and consent under the act of 1889. In the view we take of the case it will be unnecessary to discuss the sufficiency of the proof to establish the ditch by prescription or dedication.

The first section of the act of 1889 provides that when a drain has been theretofore or should thereafter be constructed by mutual license, consent or agreement of the owner or owners of adjoining lands, separately or jointly, so as to make a continuous line, or when the owner or owners of adjoining lands should thereafter, by mutual license, consent or agreement, be permitted to connect a drain with another already constructed, or when the owner of lower lands connects a drain to a drain constructed by the owner of upper lands, such drain shall be held to be a drain for the mutual benefit of the lands interested therein. Section 3 provides that when drains have been so constructed none of the parties interested shall fill or obstruct them except by the consent of all parties. Said section 3 further provides that the license, consent or agreement of

the parties need not be in writing but may be by parol, and may be inferred from acquiescence. By section 4 it is provided the act shall not apply to any cause pending nor deprive any party of the right he then might have to revoke any parol license, but if such right was not exercised within one year from the time the act took effect the right to revoke should be forever barred.

The proof in this case shows that in the neighborhood of twenty years ago James McBride, then the owner of the land described in the bill, constructed a ditch on his own land up to the highway. His fence between his land and the highway was a hedge, and believing the washing of the water conducted south along the highway threatened his hedge with injury or destruction, he preferred that the water be turned from the highway into the ditch he had constructed on his land. He met the commissioners on the land, and it was agreed that the commissioners should open a ditch from the highway across the fence, to connect with the ditch McBride had constructed on his land. The ditch was along the line of a depression or draw through the land. The commissioners of highways were of opinion it would be a benefit to the road, and in pursuance of the agreement constructed a ditch from the highway connecting with the ditch on the McBride land. The ditch made by the commissioners has never been closed, nor has the ditch on the McBride land until it was closed by appellants, in 1910. The action of the water changed the south-westerly part of it slightly from its original channel, and the ditch, from partially filling up, affected the rapid flow of the water. We find no evidence in the record of any work done to keep the ditch on the McBride land open, either by the commissioners or McBride or his grantee, after it was originally opened, until 1910. In April of that year Emma King's husband, William King, requested the commissioners to clean out the ditch through her field. They did so, or at least a part of it, at a cost of \$10.

Afterwards the Kings caused a dam to be constructed across the ditch, so that the water would not flow through it. The effect of this was to cause the water to flow back and stand on the highway, seriously injuring it.

That the ditch from the highway was extended to and connected with the ditch on the McBride land by mutual agreement and consent is not controverted. It was not revoked, but its existence as a mutual ditch was recognized by the request of Mrs. King's husband, in 1910, to repair it, and the action of the commissioners in doing so. This work was done on the land of Mrs. King and with road and bridge funds. If the act of 1889 is applicable to this case,—and we think it is,—it is clear appellants had no right to destroy or obstruct the ditch. (*Ribordy v. Murray*, 177 Ill. 134; *Wessels v. Colebank*, 174 id. 618; *Funston v. Hoffman*, 232 id. 360.) It is insisted, however, that the work done in 1910 was not in the line of the old ditch but was about three feet south of it. It appears, as we have before stated, that the action of the water had changed a part of the channel slightly but not materially. One of the commissioners testified he told Mrs. King's husband about that, and asked whether he should clean out the old channel or the new one, and King told him to do "which-ever was handiest." This is not denied. But that is not material here, for the dam was not placed in the ditch where the work was done in 1910 but was placed in the old ditch. The only explanation made by King to the commissioners for his action in placing a dam in the ditch was that he did not want the water to go that way, and when asked why he requested the commissioners to clean it out, said he did not tell them to clean out a part of it and not all of it. We think, under the evidence in this case, the law authorized granting the relief prayed.

Appellants insist that it was not competent to prove the agreement between the commissioners and McBride unless some record was made by the commissioners of their action.

We do not think this question is controlled by *People v. Madison County*, 125 Ill. 334. That was a petition for *mandamus* to compel the board of supervisors to grant county aid to build a bridge. To authorize county aid the statute provides that it must appear a necessity exists for the construction of the bridge; that its construction would be an unreasonable burden on the town; that the cost exceeds such sum as could be raised by ordinary taxation for bridge purposes in the town in one year and that one-half the necessary funds have been provided by the town. The court held these facts must be shown by the record, as they are jurisdictional. It is true, the commissioners act by virtue of their corporate authority, and their acts, in most instances, can be proved only by the record, but the act here under consideration was not required to be made a matter of record to render it valid. (*Town of Old Town v. Dooley*, 81 Ill. 255.) The expense of connecting their ditch with the McBride ditch was very small, and the fact that they did agree to the connection was evidenced by their making it.

Appellants contend that the court erred in sustaining the demurrer to the cross-bill. In the view we take of this case appellants have not been prejudiced by the action of the court in sustaining the demurrer to the cross-bill.

Appellants were not prejudiced by the ruling of the court in refusing leave to amend the answer. They were deprived of no right they were entitled to in making their defense, and the court did not abuse its discretion in refusing to permit the amendment.

We find no such prejudicial error in the ruling of the court in the admission of testimony as would justify a reversal of the decree, and it is therefore affirmed.

*Decree affirmed.*

LULU BRAND, Defendant in Error, *vs.* FRANK C. BRAND,  
Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. **CONSTITUTIONAL LAW**—*constitutional objection not affecting the objector cannot be urged.* An objection that section 11 of chapter 68 of the Revised Statutes, relating to husband and wife, is unconstitutional in so far as it applies to persons in the penitentiary, cannot be urged by a person who is not a member of that class and whose rights are in nowise affected by alleged infringement of the rights of members of such class.

2. **SAME**—*rights and duties of husband and wife are subject to statutory enactment.* Persons entering into the marriage relation assume duties and obligations in which the State is interested and which it may enforce, as it is essential to the welfare of society that the family shall be cared for and supported, its integrity be maintained and its members prevented from becoming objects of charity or a public charge.

3. **SAME**—*section 11 of act concerning husband and wife imposes no new duties.* Section 11 of the act concerning husband and wife, which makes the property of a husband or wife who abandons the other and moves to another State and remains away a year chargeable with the expenses of the family and the education of the children, imposes no new duties, as the law charges such expenses upon the property of both husband and wife though they remain in the State.

4. **SAME**—*section 11 of the act concerning husband and wife is not unconstitutional.* Section 11 of the act concerning husband and wife, which provides that where a husband or wife abandons the other and moves to another State and remains away a year his or her property shall be chargeable with the expenses of the family and the education of the children, is not unconstitutional.

5. **WORDS AND PHRASES**—*words "suit" and "action" are, in general sense, synonymous.* In a comprehensive sense and as a general rule the words "suit" and "action" are synonymous and are used interchangeably to mean any legal proceeding in a court for the enforcement of a right, and it is only where there is nothing requiring a different construction that the word "action" can be limited to proceedings at law.

6. **JURISDICTION**—*section 11 of the act concerning husband and wife authorizes service of summons by publication.* The proceeding contemplated by section 11 of the act concerning husband and wife is for the purpose of subjecting property within the jurisdic-

tion of the court to the support and maintenance of the abandoned husband or wife and the family and not for the recovery of a personal judgment, and the service by publication under the Chancery act was the service intended by the requirement that "notice of the proceedings shall be given as in ordinary actions."

7. HUSBAND AND WIFE—*the purpose of section 11 is not to take the property of one and give it to the other.* The purpose of section 11 of the act concerning husband and wife is to authorize the abandoned spouse to manage, control, sell and encumber the property of the other as shall be necessary, in the judgment of the court, for the support and maintenance of the family and for the purpose of paying debts of the other or debts contracted for the support of the family, and it was not its purpose to take the property of the abandoning spouse and give it to the abandoned one.

8. SAME—*court should ascertain, by hearing evidence, what is necessary for needs of abandoned spouse.* In a proceeding by an abandoned spouse, under section 11 of the act concerning husband and wife, for authority to manage, encumber or sell the property of the other, the court must determine, by hearing evidence, what amount is needed and must make such orders as are necessary for the protection of the rights of both parties, and it is error to give the property to the abandoned spouse by authorizing her to sell or encumber it and receive the proceeds without restriction.

9. SAME—*court should ascertain how much is necessary for a solicitor's fee.* A solicitor's fee is a necessary expense in securing the rights of an abandoned spouse under section 11 of the act concerning husband and wife, and is to be classed as an expense incurred for the maintenance of the family, but it is the duty of the court to ascertain how much is necessary for that purpose.

WRIT OF ERROR to the Circuit Court of Carroll county;  
the Hon. OSCAR E. HEARD, Judge, presiding.

RALPH E. EATON, for plaintiff in error.

JOHN O. KERCH, (CHARLES E. STUART, of counsel,) for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On February 23, 1909, the plaintiff in error, Frank C. Brand, and the defendant in error, Lulu Brand, were married in Carroll county. As soon as the marriage ceremony



was completed the plaintiff in error left and abandoned the defendant in error and removed from the State, and has since lived in the city of Clinton, in the State of Iowa. He never furnished a home for her or provided in any manner for her support and maintenance or that of the child which was born soon after the marriage. Under the will of his father he was the owner of an undivided one-third interest in a farm of about one hundred and ninety acres in Carroll county, subject to an estate for life or during widowhood in his mother, Ella Brand. On April 11, 1911, the defendant in error filed her petition in the circuit court of Carroll county against the plaintiff in error, alleging the above facts and that the farm was worth \$25,000, and praying the court for authority to manage, control, sell and encumber said property as might be necessary for her support and maintenance and for the purpose of paying debts contracted for the support of herself and their child. Upon the filing of the petition the court entered an order restraining the plaintiff in error from alienating, conveying or encumbering his interest in the real estate. Service was had to the June term, 1911, of the court by publication of notice in the manner provided for service upon non-residents in chancery. The plaintiff in error was defaulted and proof was made of the facts alleged in the petition, and also that the petitioner had no means of support and worked for a living, doing housework for neighbors, being assisted by her parents, who paid doctor's bills and other expenses. It was also shown that a few days before the hearing the defendant had executed a quit-claim deed to his mother of his interest in the real estate. The court thereupon entered a decree in the following language: "That the petitioner, Lulu Brand, be and she is hereby authorized and empowered to sell and encumber the interest of the defendant, Frank C. Brand, in the above described real estate, to-wit, [describing property,] for the purpose of supporting herself and family and for paying debts contracted for the

support of the defendant's said family and for costs and expenses by her in this behalf expended, including her solicitor's fees. It is further ordered that the petitioner pay the costs of this proceeding out of the proceeds of the sale or encumbrance so placed by her upon said premises." The record has been brought to this court in return to a writ of error.

The argument for the plaintiff in error is under three heads: First, that section 11 of chapter 68 of the Revised Statutes of 1874, authorizing the proceeding, is unconstitutional and void; second, that the court had no jurisdiction, because there was no service of summons upon the plaintiff in error; and third, because the decree is unjust and inequitable.

The section is as follows: "In case the husband or wife abandons the other and leaves the State, and is absent therefrom for one year, without providing for the maintenance and support of his or her family, or is imprisoned in the penitentiary, any court of record in the county where the husband or wife so abandoned or not confined resides, may, on application by petition, setting forth fully the facts, if the court is satisfied of the necessity by the evidence, authorize him or her to manage, control, sell and encumber the property of the other, as shall be necessary, in the judgment of the court, for the support and maintenance of the family, and for the purpose of paying debts of the other, or debts contracted for the support of the family. Notice of such proceedings shall be given as in ordinary actions, and anything done under or by virtue of the order or decree of the court, shall be valid to the same extent as if the same were done by the party owning the property."

The objection upon constitutional grounds is, that the section deprives the owner of his property without due process of law by singling out from among offenders, in general, against marital rights and duties two classes of individuals without any apparent reason and depriving them

of their property. One class consists of those who are confined in the penitentiary, but the part of the argument relating to the validity of the section as applied to that class does not require attention for the reason that the plaintiff in error is not a member of the class, and it is only one who is deprived of a constitutional right who can be heard for the correction of the wrong done to him. If under the constitutional requirement of due process of law one who is confined in the penitentiary has a right to be governed by the same rules as residents of the State not in the penitentiary in respect to remedies for the enforcement of marital obligations, the plaintiff in error has not been injured by an infringement of the right.

One who enters into the marriage relation assumes duties and obligations in which the State is interested and which it may enforce. It is essential to the welfare of society and the State that the family should be cared for and supported, its integrity maintained and its members prevented from becoming objects of charity or a public charge, and the relations of husband and wife and their rights and duties are subject to statutory enactment. The General Assembly, in the legitimate exercise of its power, has made it a misdemeanor for a husband to abandon his wife without good cause and neglect and refuse to maintain and provide for her, or to abandon his minor child or children within certain ages and in destitute circumstances. The statute protects the husband and wife from compulsory removal from the homestead unless another suitable homestead is provided, and it gives to married women who without their fault live separate and apart from their husbands, a remedy, in equity, for support and maintenance. The law also charges the expenses of the family and the education of the children upon the property of both husband and wife, and all these provisions are within the legislative power for the purpose of compelling the performance of marital duties. It is true that this section only applies to a husband

or wife who not only abandons his or her spouse, but who has also left the State and been absent therefrom for one year. If the plaintiff in error had remained in this State his property would have been chargeable with the expenses of the family and the education of the children, and the section imposes no new duty upon him. The expenses of the family are chargeable upon the property of both husband and wife, but where the owner is out of the State no personal liability could be enforced by creditors and numerous actions for small amounts would be necessary to reach property. If, as counsel says, plaintiff in error has a constitutional right to live across the State line in Iowa if he prefers to do so, yet if he also prefers to leave his wife and child here and refuses to furnish them a home and support he does not thereby absolve himself from his marital obligations. If he may free himself from a liability to personal judgment by leaving the State, he has no constitutional right to free his property in Carroll county, where he left his wife, from a lawful charge by such an act. The section provides for legal procedure, service of process and a hearing, and there is no want of due process of law.

It is next urged that the section does not authorize service by publication as in chancery but that summons must be personally served on a defendant. The absurdity of attributing to the General Assembly an intention that there should be personal service upon one beyond the limits of the State, where process could not go, is apparent. The argument is based on the language of the section in providing for notice of the proceeding as in ordinary actions, and upon the rule that the word "action" is only applicable to proceedings at law and is not properly applied to a suit in equity. That statement was made in *Mahar v. O'Hara*, 4 Gilm. 424, and in a narrow sense it is correct, but it can only be applied where there is nothing requiring a different construction. In a comprehensive sense and as a general rule the words "suit" and "action" are synonymous, and

are used interchangeably to mean any legal proceeding in a court for the enforcement of a right. (1 Cyc. 716; 1 Am. & Eng. Ency. of Law,—2d ed.—578; Webster's Int. Dict.) The term "ordinary actions" was not used in this section to designate an action at law, since in the same sentence the words "order or decree" are used, and the section provides that the court may make an order or decree, which could not be done in any of the ordinary forms of actions at law. While process must ordinarily be served personally upon residents of the State, substituted service by leaving a copy of process at the defendant's residence is provided for in certain classes of cases and is regarded as actual service, and as to non-residents of the State constructive service may be had by publication in actions for enforcement of rights in specific real or personal property which is subject to the jurisdiction of the court. (*Nelson v. Chicago, Burlington and Quincy Railroad Co.* 225 Ill. 197.) The proceeding contemplated by this section is for the purpose of subjecting property within the jurisdiction of the court to the support and maintenance of the abandoned husband or wife and the family, and not for the recovery of a personal judgment. The constructive service by publication provided by the Chancery act was the service intended, and was valid and effectual.

The section of the statute is free from any objection made to it, but the court failed to observe its provisions and the last objection must be sustained. The decree simply takes the property of the plaintiff in error and gives it to the defendant in error, which is not the purpose of the statute. The provision is, that if the court is satisfied, by the evidence, of the necessity, it may authorize the abandoned spouse to manage, control, sell and encumber the property of the other as shall be necessary, in the judgment of the court, for the support and maintenance of the family and for the purpose of paying debts of the other or debts contracted for the support of the family. No question con-

cerning paying debts of the plaintiff in error is involved. The court can only exercise judgment as to what is necessary for the support and maintenance of the family and to pay debts contracted for the support of the family, by hearing evidence and providing such amount as in the judgment of the court is necessary. There might be cases where a court could commit to an abandoned spouse the management and control of a farm or income-paying property upon such conditions as would protect the property and the rights of the owner, but it would be contrary to the statute to take the property of one and give it to the other by an authority to sell or encumber it and receive the proceeds. It is not proper, on granting a divorce, to give the wife part of the husband's real estate in fee, where there is no special equity in the particular property in favor of the wife. (*Wilson v. Wilson*, 102 Ill. 297.) If the property of the plaintiff in error is to be encumbered, it would be necessary to the protection of his rights that the court should fix the amount of the encumbrance, and if it is to be sold, compliance with the statute would require the court to ascertain its value, the price at which it ought to be sold, the best investment of the proceeds, and any other matter necessary for the protection of the rights of the parties, and it would be necessary, by means of a trustee, or in some other way, to control the fund. It might be necessary to change the amount of the allowance on account of changed conditions of the family. The solicitor's fee is a necessary expense in securing the rights of the petitioner and is to be classed as an expense incurred for the support and maintenance of the family, but the duty is committed to the court to ascertain how much is necessary for that purpose, which involves a determination of the amount which may be paid from the property of the plaintiff in error.

The decree is reversed and the cause remanded.

*Reversed and remanded.*

THE COMMISSIONERS OF SNY ISLAND LEVEE DRAINAGE DISTRICT, Defendants in Error, vs. H. T. SHAW *et al.* Plaintiffs in Error.

*Opinion filed December 21, 1911.*

1. DRAINAGE—*report of probable amount of benefits, required by section 9 of the Levee act, is not conclusive.* The report of the probable aggregate amount of benefits, which is required by section 9 of the Levee act, is a preliminary report and is merely advisory to the court, and is not conclusive of the amount which may ever be raised on the lands of the district by special assessment.

2. SAME—*limitation on amount of special assessment in drainage districts.* The only limitation found in the statute or constitution upon the amount that may be raised by special assessment against the lands of the district is that the amount raised must not exceed the benefits, and the assessment must be spread in such a way that no land will be burdened with more than its proportionate share of the cost of the improvement.

3. SAME—*extent to which assessment is limited by report as to aggregate amount of benefits.* The aggregate amount of benefits which the commissioners are required to report under clause 3 of paragraph 7 of section 9 of the Levee act means those which will accrue to the lands of the district from the repairing or completion of work theretofore constructed under any law of the State, and the limit on the assessment, by such report, applies only to such work.

4. SAME—*district organized under the Levee act is not limited to repairing or completing the work theretofore done.* A drainage district organized under the Levee act of 1879 takes its life and powers from the statute and is not limited to the repairing and completion of the work theretofore done but is authorized and required to furnish drainage for the entire district, even though, in order to perform its full duty, it may have to construct improvements not contemplated when the preliminary report was made, before the district was organized.

5. SAME—*legislature has power to authorize additional assessment upon petition of the commissioners.* Since the amendment of the constitution in 1878 it rests within the discretion of the legislature to determine whether additional assessments in drainage districts shall be levied upon the initiative of the land owners of the district or the commissioners, and hence the provision of section 37 of the Levee act authorizing such additional assessment on petition of the commissioners is not invalid.

6. SAME—*objection to the sufficiency of itemized statement of commissioners comes too late on appeal.* Where no objection to the sufficiency of the itemized statement of accounts filed with the petition of drainage commissioners for an additional assessment is made in the county court in any way, the objection cannot be raised in a proceeding to review the judgment confirming the assessment, as the filing of such statement is not jurisdictional.

7. SAME—*section 44 of the Levee act, concerning petition to abandon an assessment proceeding, construed.* Section 44 of the Levee act, concerning the filing of a petition to abandon a proceeding to levy an assessment before the contract for the proposed work shall have been let, applies only to such orders and proceedings as are made and take place before the contract is let for the construction of the original work provided for at the time of the organization of the district, and not to assessments to be levied for additional work necessary to drain lands not sufficiently drained by the original system or to carry out the original plans.

8. SAME—*provisions of section 37 of Levee act are within the title of the general act.* The title of the Levee act as originally passed stands for the entire act and each section thereof, and for the several amendments which have been passed as independent sections or added by way of amendment to the original sections, and such title is broad enough to include the various provisions of section 37 of such act as amended, as well as the subjects of its other sections.

9. SAME—*section 37 of Levee act does not provide for assessment without notice.* Section 37 of the Levee act, as amended in 1909, does not provide for an assessment without notice to the land owners, as it expressly provides for two weeks' notice in conformity to the provisions of section 3 "of this act," which means section 3 of the act of which such section 37, as amended, is a part.

10. SAME—*an objection that petition does not give names of all land owners cannot be first raised on appeal.* Section 37 of the Levee act, as amended, does not expressly require a petition for an additional assessment to give the names of all the land owners of the district, and even though the requirement may be necessary under section 2 of the act, yet an objection that the petition is insufficient in that respect cannot be raised for the first time in a court of review.

11. SAME—*affidavit of non-residence in a drainage assessment proceeding may be amended.* An affidavit, filed with the petition for an additional drainage assessment, which states that there are certain unknown land owners, and that the affiant, upon diligent inquiry, was unable to ascertain who they were, may be amended



by leave of court, under section 4 of the Levee act, to show the fact that the affiant, upon diligent inquiry, was unable to ascertain the residence of the said non-resident land owners.

12. *SAME—a party not affected by a defective affidavit of non-residence cannot complain thereof.* Sections 60 and 61 of the Levee act provide a method whereby non-residents who have not been properly served by publication or who have not entered their appearance prior to confirmation may subsequently be brought in to court and made parties, and where no non-resident land owner objects to the sufficiency of the affidavit of non-residence the other land owners cannot object for him in a court of review.

13. *SAME—general appearance waives a defective notice.* Defects in the notice given by drainage commissioners for the hearing before the jury upon the question of benefits are waived by all land owners who appear and are heard upon that question.

14. *SAME—parties not injured by commissioners' amendment of roll cannot complain.* The fact that the drainage commissioners, by leave of court, amended the roll of assessments by adding thereby certain omitted property and by assessing benefits to the highways of the district, furnishes no ground for complaint by the land owners generally, where the owners of the lands so added, and the commissioners of highways, do not complain.

15. *SAME—the assessment roll is admissible and makes a prima facie case unless overcome.* The provision of the Levee act that the roll of assessments of the commissioners shall make a *prima facie* case implies that such roll may be admitted in evidence and when so admitted will authorize a verdict confirming the assessment as made, unless the *prima facie* case is overcome by the objecting land owners; and while it is not necessary for the commissioners to testify, in the first instance, as to the basis of the assessment, it is not ground for reversing the judgment of confirmation that they were allowed to so testify when the assessment roll was admitted.

16. *SAME—what does not render assessment roll inadmissible.* The fact that the commissioners' roll of assessments also contained an estimate of the damages does not render the roll inadmissible, where the jury are instructed not to consider that part of the roll, but that in making up their finding upon the question of damages they shall be governed by the evidence submitted to them on that question other than the roll of assessments.

WRIT OF ERROR to the County Court of Pike county;  
the Hon. PAUL F. GROTE, Judge, presiding.

This was a petition filed by the commissioners of Sny Island Levee Drainage District, under the provisions of section 37 of the Levee act, to levy an assessment of \$250,000 to provide funds with which to straighten and deepen the main channel of said drainage district. A large number of the land owners of the district appeared and filed objections to the assessment and its confirmation. The petition was amended and the proposed assessment was reduced in amount. The objections were overruled and an assessment of \$160,000 was spread upon the lands of the district and confirmed, and the objectors have sued out this writ of error to review said judgment of confirmation.

The Sny Island Levee Drainage District was organized in 1880 for the purpose of draining and protecting from overflow about 110,000 acres of land situated in Adams, Pike and Calhoun counties and lying between the Mississippi river and the bluffs on the east. Through this territory there runs a natural channel, which leaves the river near Quincy and after traversing the lands of the district for about fifty miles returns to the river. This channel was adopted at the time of the organization of the district and now is the main channel of the district, and is commonly called the Sny Carte, and this is the channel proposed to be straightened and deepened. Prior to 1880 these lands had been organized into a drainage district under the act of 1871, and a levee had been projected and in part completed from the river near the head of the Sny Carte, and on its east bank, to the river near the mouth of the Sny Carte,—in all about fifty miles in length. After this court, in *Uppdike v. Wright*, 81 Ill. 49, and *Webster v. Levee Comrs.* (unreported,) had held that a levee along a river as an independent work was unauthorized by the statute then in force or by the constitution, and after the amendment of section 31 of article 4 of the constitution had been adopted in 1878 and the Levee act of 1879 had been passed, the Sny Island Levee Drainage District was organized under

the act of 1879. It was doubtless intended by its projectors that the Sny Island Levee Drainage District should take the place of the old district and complete and maintain the work which the old district had commenced but by reason of its illegality was unable to complete and maintain,—that is, levee the Sny Carte on its east bank from its head to its mouth and thereby shut out from the district the overflow of the Mississippi river,—and the completion of said levee and the improvement of the Sny Carte represent substantially the work done in the district thus far. From the organization of the district until the present petition was filed, assessments aggregating \$472,000 have been levied upon the lands of the district. In addition to this an annual assessment for repairs of \$19,000 has been levied, and the general government at one time appropriated \$50,000 with which to repair and maintain the levee. It appears, therefore, that at least three-quarters of a million dollars have been used in the district since its organization. As a result of this expenditure the lands of the district have been greatly increased in value and are now worth many millions of dollars. It appears a number of creeks which have extensive watersheds outside of the district flow into the district from the east and empty their waters into the Sny Carte, and the waters of the river on the north having been shut out of the old channel of the Sny Carte by a levee at that point and its current thereby largely destroyed, the silt and debris brought into the Sny Carte from the said creeks have greatly reduced its size, and it was represented to the court in the petition that unless the Sny Carte was straightened and deepened the lands of the district would be greatly damaged, and that at the time the petition was filed a considerable portion of the lands of the district, by reason of the choking up of the main channel of the district, were without sufficient drainage. It also was represented that the district was without funds to pay for the work of straightening and deepening the Sny Carte and

that it was necessary to levy an assessment for that purpose. In brief, this was the situation of the district at the time the petition was filed.

Numerous questions have been raised upon this record, which is voluminous, and we will take them up in the order in which counsel have considered them in their respective briefs and dispose of them, or such of them as we deem necessary for the proper disposition of this writ of error.

W. E. WILLIAMS, A. CLAY WILLIAMS, and FRANK J. PENICK, for plaintiffs in error.

ANDERSON & MATTHEWS, and WILLIAM MUMFORD, for defendants in error.

Mr. JUSTICE HAND delivered the opinion of the court:

*First*—Section 9 of the Levee act (Hurd's Stat. 1909, chap. 42, p. 859,) requires the commissioners, immediately after their appointment, to examine all the lands proposed to be drained or protected, and in case the prayer of the petition is for the purpose of repairing and maintaining a levee or levees, ditch or ditches, theretofore constructed under any law of this State, to report to the court what lands will be benefited thereby and the probable aggregate amount of such benefits. The commissioners, in accordance with the mandate of the statute, reported the probable aggregate amount of benefits to the lands of the district from the repairing and maintaining of the levee or levees, ditch or ditches, theretofore constructed was the sum of \$500,000, and it is said that finding is binding upon the district, and that no greater sum than \$500,000 can be raised in the district by special assessment with which to pay for improvements, regardless of the amount of actual benefits which would accrue to the lands of the district from the improvement, and as it appears that \$472,000 has already been raised by special assessment in the district, this assessment

is excessive by \$132,000 and that it cannot be sustained. The report required by section 9 is a preliminary report and is merely advisory to the court, and is not, we think, conclusive of the amount that may be raised by special assessment in the district. In *Michigan Central Railroad Co. v. Spring Creek Drainage District*, 215 Ill. 501, in speaking of the legal effect of the report required to be made under section 9, it was said (p. 504): "This report is in no way conclusive as to any of the matters contained in it." We think this must necessarily be true, as at the time the report is made the district is not organized and may never be organized, and the report as to what lands will be benefited and the probable aggregate amount of such benefits is made by the commissioners to the court in order that the court may be advised upon the question whether the district should be organized, and is not made for the purpose of fixing benefits as a basis for future assessments. The only limitation upon the amount that may be raised by special assessment against the lands of the district found in the statute or constitution is that the amount raised must not exceed the benefits, and that they must be spread in such a way that no land will be burdened with a greater amount than its proportionate share of the cost of the improvement. It is clear that by clause 3 of paragraph 7 of section 9 of the Levee act, by virtue of which the finding was made by the commissioners, the assessment is limited by the probable aggregate amount of benefits which will accrue to the lands of the district from the repairing or completion of work theretofore constructed under any law of this State, (*Blake v. People*, 109 Ill. 504,) and must be held to apply here only to the benefits to accrue to the lands of the district by the repairing or completion of the levee or levees constructed by the old district to confine the waters of the Sny Carte. The district, however, as organized was not limited to that improvement, but it takes its life and chartered powers from the statute, (*People v. Lease*,

248 Ill. 187,) and it is not only authorized but is required to furnish drainage to the entire district. (*Binder v. Langhorst*, 234 Ill. 583.) In order to perform its full duty to all the lands in the district it may be required to construct improvements not contemplated at the time the preliminary report was made, before the district was formed. To hold that a district is concluded as to the amount which it can lawfully raise by special assessment by the amount found as the probable aggregate amount of benefits by the commissioners in the preliminary report required to be made by section 9, would be in many instances to so tie the hands of the district as to render its organization futile and abortive. This was an additional assessment made to pay for work not contemplated at the time the district was organized, and is not controlled by the decision in *Morgan Creek Drainage District v. Hawley*, 240 Ill. 123. Our conclusion is that the district was not limited in the amount it might raise by special assessment by the finding of the commissioners that the probable aggregate amount of the benefits was \$500,000.

*Second*—It is next contended that the commissioners were powerless to file a petition to levy this assessment, and that in no event could it be levied except upon the petition of a majority of the land owners representing one-third in area of the lands of the district.

Section 37 of the Levee act, in part, is as follows: "And assessments from time to time may be levied on the land within any district when it shall appear to the court that the previous assessment or assessments have been expended or are inadequate to complete such work, or are necessary for maintenance or repair, or when it shall become necessary for the construction of additional work, or the completion of any work already commenced within any drainage district to insure the protection or drainage of the lands in said district, under the direction and order of the court, or to pay obligations incurred for the current ex-

penses of said district or in the keeping in repair and protection of the work of such district, on a petition of a majority of the land owners within said district who are of lawful age and represent at least one-third in area of such lands, or on the petition of the commissioners, accompanied by an itemized statement of accounts made by the commissioners under oath, showing the moneys received by the district and the manner in which they have been expended, together with the plats and profiles of such additional work and estimated cost of the same."

It is clear from the language of said section that it was the intention of the legislature that an additional assessment or assessments might be levied upon the lands of a drainage district organized under the Levee act, upon either the petition of a majority of the land owners representing one-third of the lands of the district or the commissioners, when it was made to appear to the court that the moneys theretofore raised by assessment had been expended or were inadequate or were not sufficient for maintenance or repairs, or where it was necessary that more money be raised to pay for additional work or for the completion of work already commenced, and unless it can be said that the legislature is powerless to authorize an additional assessment or assessments to be levied upon the petition of the commissioners, this contention of the plaintiffs in error cannot be sustained. In *Fountain Head Drainage District v. Wright*, 228 Ill. 208, the assessment was levied upon the petition of the commissioners and approved, and in *Binder v. Langhorst*, *supra*, it was held in a proper case the commissioners might be coerced by *mandamus* to levy an additional assessment or assessments with which to furnish complete drainage to the district. Since the amendment to the constitution in 1878 it rests within the discretion of the legislature to determine whether additional assessments shall be levied upon the initiative of the commissioners or the land owners of the district. (*Blake v. People*, *supra*;

*Kilgour v. Drainage Comrs.* 111 Ill. 342; *Huston v. Clark*, 112 id. 344; *Owners of Lands v. People*, 113 id. 296.) The argument of the plaintiffs in error that an assessment cannot be levied upon the lands of a district other than upon the application of the land owners of the district, based upon *Updike v. Wright, supra*, is without force, as the constitutional amendment was adopted with the obvious purpose of meeting the decision in that case. Our conclusion is that this assessment was properly levied upon the petition of the commissioners.

We are also of the opinion that the contention that the itemized statement of accounts filed with the petition by the commissioners is insufficient to give the court jurisdiction to levy this assessment cannot be sustained. The sufficiency of the statement was not challenged in the court below by motion or objection and the filing of said statement is not jurisdictional. Had the sufficiency of the statement been challenged in the court below and been found to be insufficient it could have been corrected by amendment, and the land owners of the district cannot now for the first time raise the question of the insufficiency of the itemized statement filed by the commissioners with their report. *Fountain Head Drainage District v. Wright, supra*; *Lovell v. Sny Island Drainage District*, 159 Ill. 188; *Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co.* 249 id. 260.

*Third*—After the commissioners had filed their roll of assessment of benefits and damages, and before a jury was empaneled to make the assessment, a petition was filed, under section 44 of the Levee act, asking that the proceeding to levy this assessment be abandoned. The commissioners and certain land owners of the district made a motion to strike the petition from the files, which motion was allowed and the petition was stricken, and the action of the court in striking the petition to abandon has been assigned as error. Section 44 provides that if, at any time before the



contract for the construction of the proposed work shall have been let, a petition shall be presented to the county court to abandon the work, signed by not less than two-thirds in number of all the land owners assessed for benefits in the district to which the petitioners belong, whose aggregate assessment amounts to not less than one-half the cost of the proposed work, and all debts and expenses incurred up to the time of the filing of the petition have been paid, the court shall enter an order upon its records granting the prayer of said petitioners upon the conditions specified in that section of the statute. If it be conceded that the petition here was in proper form and that it was signed by the requisite number of land owners, still we do not think the court erred in striking the petition from the files. It was but asking the court to undo what it had just determined to do,—that is, order the levy of said assessment,—and amounted to no more than a petition for a rehearing or a motion for a new trial, and no sufficient reason was shown why the prayer of said petition should have been granted.

There is another sufficient reason why the court did not err in striking the petition to abandon from the files, which is, that section 44 does not apply to every order of the court providing for the levy of an assessment upon the lands of the district, but only applies to such orders and proceedings as are made and take place before the contract is let for the construction of the original system of drainage provided for at the time of the organization of the district, and does not apply to assessments levied for additional work to be done in the district to drain lands in the district which are not sufficiently drained by the original system, or for additional work, or to complete work being constructed in accordance with the original plans adopted for drainage at the time of the organization of the district.

The scope and office of section 44 were before this court in *Soran v. Union Drainage District*, 215 Ill. 212, where

a sub-district was sought to be abandoned and a petition to abandon was stricken from the files. In that case, on page 214, it was said: "The appellants claim that under the provisions of this section, upon the filing of the proper petition to abandon, the court had no discretion in the matter but should have dismissed the petition. We do not think this contention is sound. Section 44 is one of seventy-four sections composing the Drainage act of May 29, 1879. This act provides the successive steps for the establishing of a complete system of drainage, including the organization of the district, the appointment of the commissioners, the levy of the tax, the letting of the contract, etc. Section 44 provides a method of abandoning the work before the contract is let. The contract referred to in the section is the contract for the original ditch or system of drainage. It does not refer to additional work in order to drain lands which are not sufficiently drained by the original system. Section 59, before being amended, provided for the construction of additional ditches after the original assessment had been made, in order to afford complete drainage to lands not sufficiently drained under the original profiles, plans and specifications. If this petition for additional drainage had been filed before the original contract had been let another question would be presented, but as the original contract had been let before the petition for additional drainage was filed, section 44 did not apply."

The court did not err in striking the petition from the files.

*Fourth*—It is further contended that section 37 of the Levee act is unconstitutional, first, because that section, as amended, contains more than one subject, which subjects are not expressed in its title; second, because that section does not provide for notice to the land owners of an assessment levied by virtue of its provisions; and third, because that section provides for the levy and assessment

upon lands of the district upon the petition of the commissioners, and thereby ignores the rights of the land owners and deprives the land owners of the district of the right to say whether their land shall be assessed.

(1) The section now under consideration was a part of the original act of 1879, which contained seventy-four sections. This particular section never had a title as it was originally passed or as it has since been amended. The title of the act as originally passed stands for the entire act and each section thereof, and for the several amendments which have been passed as independent sections or added by way of amendments to the original sections, and if the title of the original act is broad enough to cover the act as passed and the subjects which have been carried into the act by amendment, then its title is not incomplete and in conflict with section 13 of article 4 of the constitution, which provides that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title of the original act is, "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts." That title is broad enough not only to cover the provisions of section 37 as amended, but the subjects of all the other sections of the act; and such was the holding of this court in *Blake v. People, supra*, where the point was specifically urged that the title of the act was bad, as being in conflict with section 13 of article 4 of the constitution.

(2) We think it clear that section 37 does not provide that the lands of the district may be assessed for the purposes specified in that section without notice to the land owners of the district, as that section, as amended in 1909, provides for two weeks' notice in conformity to the provisions of section 3 of "*this act*,"—that is, of the act of which section 37 forms a part as amended, which is the

original act. The question here raised was passed upon adversely to the contention of the plaintiffs in error in *Stack v. People*, 217 Ill. 220.

(3) The contention raised under this division of the brief of the plaintiffs in error has already been considered and determined in the second paragraph of this opinion, where it is held the plaintiffs in error were deprived of no constitutional rights by permitting the commissioners to initiate an assessment for the purpose specified in said section 37. In *Blake v. People, supra*, the second ground upon which the Levee act was thought to be unconstitutional was, "that it authorizes the county court, and not the owners of land, to create the corporation, and is not, therefore, within the letter or the spirit of the amendment to section 31, article 4, adopted by the people at the November election in 1878, apart from which amendment the General Assembly possessed no power to authorize the creation of such corporation." After holding that *Updike v. Wright, supra*, could have no application because of the constitutional amendment adopted subsequent to that decision, the court said, in speaking of this right of the owners to organize a district: "We are unable to discover, here, any limitation or restriction upon the General Assembly as to the agencies to be used in the creation of the corporation." And in *Kilgour v. Drainage Comrs. supra*, the same question was raised and the same result reached by the court. (See, also, *Huston v. Clark, supra*.) In the later case of *Binder v. Langhorst, supra*, it is held that not only the commissioners can proceed under section 37, but that they must proceed under section 37 in a proper case or be liable for damages or be coerced by *mandamus*.

Our conclusion is that no valid constitutional objection has been suggested by plaintiffs in error to said section 37.

*Fifth*—It is urged the petition was not sufficient because it does not give the names of all the land owners in the district. We are unable to discover that this question was

raised in the court below and it cannot be raised in this court for the first time. (*Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co. supra.*) Section 37 does not require the petition to contain such information, although section 2 of the act for the organization of drainage districts seems to contemplate that the petition shall give the names of the owners, if known. In *Huston v. Clark, supra*, it was held that the failure to state the names of land owners in a petition for the formation of a drainage district could not be taken advantage of by a land owner on appeal from a judgment confirming a special assessment on his land, where he had contested the application without making any objection on that account, so as to afford an opportunity to obviate the objection by amendment. The *Huston case, supra*, fully answers the position of plaintiffs in error that it was necessary that the petition state the names of the land owners of the district.

*Sixth*—It is also urged that the affidavit of non-residence filed with the petition is insufficient because it does not state that the affiant (one of the commissioners) was unable to ascertain, upon diligent inquiry, the residence of certain unknown non-resident land owners. The affidavit did state that there were certain unknown land owners and that upon diligent inquiry the affiant was unable to ascertain who they were, and upon the defect in the affidavit being pointed out, the defendants in error, by leave of court, filed an amended affidavit supplying the omission in the original affidavit, and we think this practice admissible by virtue of the terms of section 4 of the Levee act, which provides that the petition, affidavit and order of court may be amended. Affidavits in attachment proceedings, which are jurisdictional by virtue of the statute, may be amended, and we have no doubt but that the legislature may authorize such amendments in drainage proceedings. If, however, the affidavit as to unknown residents was wholly insufficient and the defect was not cured by amendment, that fact fur-

nishes no sufficient reason for the reversal of the judgment of confirmation as to the plaintiffs in error. Sections 60 and 61 of the Levee act furnish a method whereby non-residents who have not been properly served by publication or entered their appearance prior to confirmation may be subsequently brought into court and made parties to the judgment of confirmation, and as no non-resident is now objecting for want of notice, the plaintiffs in error cannot object for them, as they cannot complain of defects in the proceedings or rulings of the court which only affect other parties to the proceedings. (*Iroquois Drainage District v. Harroun*, 222 Ill. 489; *Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co. supra.*) The cases of *Mason and Tazewell Drainage District v. Griffin*, 134 Ill. 330, and *Sanner v. Union Drainage District*, 175 id. 575, were proceedings under the Farm Drainage act for the purpose of organizing districts, and differ from the case at bar.

It is also said the notice given by the commissioners for the hearing before the jury upon the question of benefits and damages was insufficient. No one is here objecting to that notice who did not appear and who was not heard before the court and jury upon those questions, and having appeared generally, it makes no difference whether they were properly notified of the hearing before the jury or not, and they are not in a position to complain on behalf of persons who did not appear. We are of the opinion that judgment of confirmation should not be reversed by reason of the want of sufficient affidavit of non-residents, or by reason of a defective notice to appear before the jury on the hearing upon the question of the assessment of benefits and damages.

*Seventh*—After the commissioners had completed their roll of assessments, by leave of court they were permitted to amend the roll by adding thereto certain omitted property and by assessing benefits to the highways of the dis-

trict. The owners of the property added and the commissioners of highways are not here complaining, and the same rule applies here as applies with reference to notice. If the owners of the added property and the commissioners of highways are satisfied and do not desire to object to the judgment of confirmation, the plaintiffs in error are not in a position to object for them.

*Eighth*—It is objected that the court erred in admitting in evidence the roll of assessments of the commissioners and in permitting the commissioners to testify upon the trial as to the basis upon which the assessments were made. The Levee act provides that the roll of assessments made by the commissioners shall make a *prima facie* case. This implies that the roll of assessments will go to the jury, and when so admitted will carry such probative force as to entitle the commissioners to a verdict confirming the assessment as made by them if the *prima facie* case made by the roll of assessments is not overcome by the objecting land owners. The court did not err in permitting the roll of assessments to go to the jury, and while it was not necessary that the commissioners should have been called in chief as witnesses, their evidence clearly was admissible in rebuttal, and the judgment of confirmation should not be reversed by reason of the fact that the plaintiffs in error put in evidence all their proof before resting their case. In *Lovell v. Sny Island Drainage District*, *supra*, on page 203, it was said: "The assessment roll makes out a *prima facie* case, and the commissioners are not required to resort to other evidence, except such as may be necessary to meet the evidence introduced by the objectors to impeach the assessment. (*Briggs v. Union Drainage District*, 140 Ill. 53.) A *prima facie* case must prevail unless it be rebutted or the contrary proved. (1 Starkie on Evidence, 544.) *Prima facie* evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact, and if not rebutted it remains sufficient for the purpose." And in *Trigger v.*

*Drainage District*, 193 Ill. 230, it was said, on page 235: "Counsel admit that the assessment roll made a *prima facie* case for the district, but they seem to insist that 'when any evidence is introduced on behalf of the objectors then such *prima facie* case loses its force in law, and evidence of some nature must be introduced to rebut objector's evidence.' This, they say, 'has always been the law, and we need cite no cases to sustain our contention.' We held directly the contrary in *Lovell v. Sny Island Drainage District*, *supra*, citing *Briggs v. Union Drainage District*, *supra*, Starkie on Evidence, 544, and *Kelly v. Jackson*, 6 Pet. 622."

*Ninth*—It is contended the jury erred in making the assessment, in this: that the lands of some of the objectors were assessed more than they will be benefited, while the lands of others are assessed more than their proportionate share of the cost of the improvement. The jury went upon the lands, and we have been unable to see that the court erred in its rulings upon the evidence which was submitted to the jury, and their assessment, we think, is well within the evidence. We are not, therefore, disposed to disturb the assessment upon the evidence.

*Tenth*—Complaint is made that the assessment roll of the commissioners, which went to the jury upon the subject of benefits, also contained an estimate of the damages. That part of the roll the jury were instructed not to consider, but that in making up their finding upon the question of damages they should be governed by the evidence submitted to them on that question other than the roll of assessments. The jury could not, therefore, have been misled upon the question of damages by the admission of the roll of assessments, and the fact that generally the jury and the commissioners agreed upon the amount the several tracts of land in the district would be benefited or damaged does not tend to impeach the assessment roll as finally agreed upon by the jury and returned into the court.



*Eleventh*—Complaint is made of the rulings of the court upon the instructions which were given by the court to the jury. The plaintiffs in error offered no instructions and but five were given to the jury on behalf of the defendants in error. No specific errors are pointed out in the instructions but the criticisms made thereon are general, and we have been unable from their perusal to discover any errors which should work a reversal of the judgment. We think the jury were fairly instructed as to the law.

We have given this record a patient examination and are of the opinion there is found therein no substantial error. The judgment of the county court will be affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* Charles M. Griffith *et al.* Appellees, *vs.*  
HENRY J. MOHR *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. ORDINANCES—*the rules for construing statutes apply to ordinances.* The rules applicable to the construction of statutes apply also to the construction of ordinances.

2. SAME—*when ordinance may be enforced as to valid portion.* If an ordinance is invalid as relating to one subject matter but valid as to another, and the two subjects are not necessarily or inseparably connected, the ordinance may be enforced in so far as it is valid and disregarded in so far as it is invalid.

3. DRAM-SHOPS—*when the amendment to dram-shop ordinance is repugnant to original ordinance.* A section added as an amendment to a dram-shop ordinance and purporting to exclude certain described territory in the village from the operation of the original ordinance, which placed a limit upon the number of dram-shop licenses to be thereafter issued to one for every five hundred inhabitants of the entire village, is repugnant to the original ordinance, as it is impossible to give effect to both.

4. SAME—*when repugnant provision of ordinance may be disregarded.* The passage of an ordinance limiting the number of dram-shop licenses to be thereafter issued to one for every five hundred inhabitants of the entire village establishes the policy of

the village in that regard, and an additional section, added as an amendment, which attempts to except certain described territory from the provisions of the original ordinance, may be disregarded for repugnancy and the original ordinance be enforced, no question being made as to the power of the village to enact it.

APPEAL from the Superior Court of Cook county; the Hon. CHARLES A. McDONALD, Judge, presiding.

FRANK S. RICHEIMER, for appellants.

M. R. HARRIS, and JOHN J. SWENIE, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

The People, on the relation of Charles M. Griffith and Charles A. Kelso, partners under the firm name of Griffith & Kelso, filed a petition against the board of trustees of the village of Forest Park for a writ of *mandamus* commanding said board of trustees to issue to the relators a license to conduct a dram-shop in said village. The board of trustees demurred to the petition. The demurrer was overruled, and, the said board electing to stand by the demurrer, judgment was rendered awarding the peremptory writ. The board of trustees prayed an appeal, and the superior court certified that the validity of a municipal ordinance was involved and that the public interest required the appeal to be prosecuted directly to the Supreme Court, and the record has been brought to this court by the board of trustees for review.

An ordinance providing for the licensing of dram-shops in the village of Forest Park was passed by the board of trustees in April, 1902. Said ordinance specified the conditions to be complied with by applicants for licenses, fixed the sum to be paid for a license and the time for payment, but placed no limit to the number of licenses that might be issued. April 14, 1908, the board of trustees passed another ordinance on the subject of dram-shop licenses. The

said ordinance consisted of three sections. The first section provided that after the passage of the said ordinance no license should be granted to keep a dram-shop or saloon except as provided in sections 2 and 3. Section 2 provided that all lawful dram-shop licenses in force April 30, 1908, might be renewed upon strict and full compliance with the laws and ordinances of said village in force at the time of the application for renewal, but no new license to keep a dram-shop should thereafter be granted until the number of licenses in force at the time should be less than one for every five hundred of the population of the village, as ascertained by the last preceding school census; that when the population exceeded five hundred for every license in force, new licenses were authorized to be issued upon full compliance with the ordinance by the applicant, until the total number of licenses in force should equal one for every five hundred of population. Section 3 provided for the assignment, renewal and re-issue of licenses. On June 14, 1909, the village board adopted another section as an amendment to the ordinance of 1908, denominated section 3a. Said section 3a provides that sections 1, 2 and 3 shall not apply to the territory bounded on the east by Desplaines avenue, on the south by Harrison street, and on the other sides by the right of way of the Aurora, Elgin and Chicago Railway Company. The petition set out all these ordinances in full and alleged that the relators are persons of good character; that April 27, 1911, they made application to the board of trustees for a license to keep a dram-shop at No. 7200 Washington street; that they presented with their application good and sufficient bonds required by law and by the ordinances of the village; that they tendered the license fee of \$500 and in all other respects complied with the requirements of the laws and ordinances, but said board of trustees refused to grant said license. The petition avers that said board of trustees based its refusal to issue the license upon the ordinance of 1908 limiting the number of

saloon licenses to one for every five hundred of population, and further alleged that said ordinance was "vitiated, nullified and in effect repealed by adding thereto the section known as section 3a, wherein and whereby a large portion of the territory of said village of Forest Park attempted to be set apart and excluded from the operation of said ordinance, and destroying the general application of said ordinance to said village." The application of relators refused by the board of trustees was for a license to conduct a dram-shop in that part of the village not exempted by section 3a from the operation of the ordinance of 1908.

The point raised for decision by this court is stated by counsel for the relators (appellees) in the following language: "Did the act of the president and board of trustees in passing the amendment to the limitation ordinance, known as section 3a, in effect repeal the limitation ordinance of 1908? If not, did such amendment destroy the general nature of the limitation ordinance and render it restricted and partial in its operation?"

By "limitation ordinance" is meant the ordinance of 1908 limiting dram-shop licenses to one for every five hundred of population. It is apparent that ordinance did not repeal, and was not intended to repeal, the general ordinance of 1902 upon the subject of dram-shop licenses, but its effect was to limit the number of licenses that might be granted under the ordinance of 1902. The right of a municipality to limit the number of licenses, and the validity of the ordinance of 1908, are not questioned in this action. There was nothing inconsistent between the ordinance of 1902 and that of 1908. After the adoption of the ordinance of 1908 the ordinances of the village provided for licensing dram-shops but limited the number of such licenses to one for every five hundred of population. Section 3a, adopted in 1909, did not purport to, and it seems clear it was not intended to, repeal any ordinance previously adopted. It

was intended as an additional section to the ordinance of 1908.

We are of opinion the ordinance of 1908 and section 3a cannot stand together. The three sections adopted in 1908 limit the authority of the board of trustees in issuing dram-shop licenses to one for every five hundred population of the entire village. Section 3a excepts a certain district of the village from that limitation, so that in the excepted district the board of trustees may issue licenses without any limit whatever. If section 3a is valid, more licenses might be issued in the territory excepted than would equal one for every five hundred population of the entire village.

As an illustration why effect cannot be given to the three sections adopted in 1908 and section 3a we will suppose the village has a population of five thousand and one-fourth of the population is in the territory described in section 3a where there is no limit to the number of licenses that may be issued and three-fourths reside outside that territory. On the basis of one saloon for every five hundred population but ten licenses could be issued for the entire village by the board of trustees. But section 3a in effect says that in a certain part of said village there shall be no limit to the number of licenses issued. We will further suppose that there are now ten saloons in the territory described in section 3a. Under the ordinance as adopted in 1908 no license could be granted to run a dram-shop in that part of the village not embraced in section 3a, because on a basis of one license for every five hundred of population ten licenses would be the limit. On the other hand, if the limitation of one saloon license for every five hundred population is to be given effect, if there were ten saloons in that part of the village outside of the territory described in section 3a no license could be issued to conduct a dram-shop in that part of the village described in said section. Effect cannot be given to the three sections adopted in 1908 and section 3a at the same time. To give effect to either, the

other must be disregarded. It is unlike a case where the municipal authorities designate certain territory within which licenses will be granted and certain districts within which they will not be granted. In no possible view that we can take of the question can the ordinance limiting the number of saloon licenses to one for every five hundred population of the village and the amendment made by section 3a both be given effect.

The question then is, what effect, if any, will be given to section 3a? Appellees insist it nullified or repealed the provisions of the ordinance adopted in 1908 and leaves the number of saloon licenses to be issued in the entire village without limit. We are of opinion section 3a should be held invalid, and unless it forms such an essential part of the ordinance to which it was an amendment that it can not be held invalid without invalidating the whole ordinance, the other sections of the ordinance should be sustained. In *Wilbur v. City of Springfield*, 123 Ill. 395, it was held to be a settled rule of construction that if a provision of an ordinance relating to one subject matter be invalid and as to another valid, if the two are not necessarily or inseparably connected the ordinance may be enforced as to the valid portion and the invalid portion disregarded. In *Harbaugh v. City of Monmouth*, 74 Ill. 367, the court considered the validity of an ordinance prohibiting sales of intoxicating liquors but which embraced in its provisions a class of sales it was contended the city had no power to prohibit. The court said (p. 370): "Even were it true, as contended, that the ordinance embraced sales that the council had no power to prohibit, we perceive no reason why it may not be enforced to the full extent that the city council had the power to legislate on the subject. This question arose in the case of *Kettering v. City of Jacksonville*, 50 Ill. 39, and it was there held that an ordinance might contain a provision not authorized and yet be valid in so far as authority was given to enact it."

We think there can be no doubt of the intention of the board of trustees in the adoption of these ordinances. The three sections adopted in 1908 established the policy of the village to issue only one dram-shop license for every five hundred population in the entire village. Section 3a was not intended to abrogate or change that policy except as to a part of the village described in said section. As to the rest of the village the limitation of one license to every five hundred population was to remain in force. We have seen the legislation adopted was insufficient to give effect to the intention of the board of trustees, and that either section 3a must be disregarded and the three sections adopted in 1908 held to be in force, or if section 3a is given effect it must result that the other sections of the ordinance were repealed by it and that there is now no limit to the number of dram-shop licenses, which would be a complete nullification of the policy of the village, and it is very clear the board of trustees never intended section 3a should have that effect. The rules applicable to the construction of statutes apply also to the construction of ordinances. (*People v. Hummel*, 215 Ill. 43.) It has been held in the construction of statutes, that where the first clause of a section conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by a later inconsistent clause which does not conform to this policy and intent. *State v. Bates*, 96 Minn. 110; 113 Am. St. Rep. 612; *Hall v. State*, 39 Fla. 637; 23 So. Rep. 119.

Applying the foregoing rules of construction, we think it must be held that section 3a is invalid and did not affect the other three sections of the ordinance. It follows, therefore, that the court erred in overruling the demurrer.

The judgment is reversed and the cause remanded to the superior court, with directions to sustain the demurrer.

*Reversed and remanded, with directions.*

THE PEOPLE *ex rel.* Frank C. Vaughn, County Collector,  
Appellee, *vs.* A. CECIL WELCH *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. DRAINAGE—*right of land owners to join in objections to an application for judgment and order of sale.* On an application for judgment and order of sale for a delinquent drainage assessment it is proper for the land owners to join in such objections as apply to all the lands, and unless it is apparent from the objections themselves, when considered in connection with the application, that confusion or embarrassment will result from permitting objectors to join, the objections should not be stricken from the files.

2. SAME—*a fraudulent change of classification renders assessment invalid.* A fraudulent change by the commissioners in the classification after it has been finally determined upon and before the assessment is made renders the assessment on the classification so fraudulently changed invalid, and the objection may be urged by the land owners jointly, on application for judgment and order of sale for the delinquent assessment. (*Leonard v. Arnold*, 244 Ill. 429, distinguished.)

3. SAME—*objection that assessments are in excess of benefits may be made on application for judgment.* Since the Farm Drainage act was amended, in 1901, by striking out section 27, the land owners have no opportunity to be heard with reference to the assessment until application is made for judgment and order of sale, and it is therefore proper, on such application, to raise the objection that the assessments are in excess of benefits, and as such objection affects each tract of land, even though not in the same proportion, the land owners may join in the objection, and upon the hearing the court should hear the proof on the question of benefits and sustain the objection as to any excess of the assessment above the benefits.

4. SAME—*commissioners must find that amount levied is necessary.* Before the farm drainage commissioners are authorized, under section 26 of the Farm Drainage act, to make out an assessment roll or tax list they must provide for the amount of the assessment by a resolution stating that the amount named is necessary; and a failure of the commissioners to find that the amount levied is necessary to be raised by special assessment is a valid objection on application by the collector for judgment of sale.

5. SAME—*what may be shown under an objection that land has never been legally included in district.* Under an objection that



none of the lands of the objectors in a certain county had ever been legally included within the district, which was organized in another county, the objectors cannot attack the corporate existence of the district, but they may show, if they can, such facts as will show a lack of jurisdiction in the drainage commissioners to levy any tax against the lands.

6. SAME—*what action by commissioners does not have any effect upon the classification.* Section 21 of the Farm Drainage act authorizes the commissioners, under certain conditions, to make a new classification, but the determination to make a new classification must be arrived at in a regular meeting of the commissioners and a record of it made and preserved; and any written statement by the commissioners, or a majority of them, that the classification made is not in accordance with justice and right does not affect the classification or the assessment.

7. SAME—*the fact that those paying assessment admitted that classification was unjust cannot be proved.* Land owners have a right to be heard as to the final adoption of the classification, but when the classification is once adopted it can be changed only by the commissioners in the manner pointed out by the statute; and the mere fact that the persons, or a majority of them, who paid the assessment without objection admitted that the classification was not in accordance with justice and right cannot be made the basis of an objection to the application for judgment.

8. SAME—*objection that district has been absorbed can only be made in a direct proceeding.* An objection that the drainage district has been absorbed by another district cannot be urged upon application for judgment and order of sale for a delinquent drainage assessment, as such objection goes to the corporate existence of the district and can only be made in a direct proceeding.

9. SAME—*objection that proposed ditch does not have an adequate outlet is not valid.* Land owners have a remedy, by *mandamus*, to compel drainage commissioners to provide outlets of ample capacity for the waters of the district, and hence an objection that the ditch has no adequate outlet is not a valid one to urge on application for judgment and order of sale.

10. SAME—*Farm Drainage act does not provide for confirmation of assessment.* An objection that a farm drainage assessment was never confirmed is not valid, as the Farm Drainage act does not provide for such confirmation, and if it is intended by such objection to raise the point that the assessment roll was not filed with the town clerk, as provided by the act, the objection should state that fact specifically.

II. SAME—*fact that delinquent list does not provide for collection of interest is not a valid objection.* The fact that the county collector may not have included interest on the delinquent assessment does not furnish the land owners with a valid objection to the application for judgment and order of sale.

APPEAL from the County Court of Lee county; the Hon. ROBERT M. SCOTT, Judge, presiding.

CARL E. SHELDON, for appellants.

HARRY EDWARDS, JOHN E. ERWIN, and FRANK J. BOWMAN, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

The county collector of Lee county made application to the county court for judgment and sale of the lands of appellants for the delinquent taxes assessed by Drainage District No. 3 of the town of Montmorency, in Whiteside county. Appellants jointly filed nineteen objections, which, upon motion of the People, were stricken from the files. Judgment was entered as applied for, and from that judgment this appeal was perfected.

The objections filed by appellants were: (1) That the classification was fraudulently changed after it had been decided upon by the commissioners; (2) that after the classification had been made two of the commissioners "signed a paper" that it was not in accordance with justice and right; (3) that the objectors represent five-sixths of the assessment, and of the five land owners not objecting four had signed a statement that the classification was not in accordance with justice and right; (4) that said Drainage District No. 3 had been absorbed by another district; (5 and 6) that the assessments were in excess of the benefits; (7) that the assessment is greatly in excess of the amount required and that the record of the commissioners does not show that such amount of money is necessary;

(8 and 9) that no itemized statement of the cost of the work and no plans for the proposed work have been filed with the town clerk; (10) that the plans do not provide for the building of bridges in enclosed fields; (11) that the assessment is against persons instead of against lands; (12) that the proposed ditch does not have an adequate outlet; (13) that two of the drainage commissioners, after the assessment was made, signed a statement that the proposed improvement is for a larger ditch than is necessary; (14) that the delinquent list does not show that the assessment is past due; (15) that the assessment was never confirmed; (16) that the delinquent list does not provide for the collection of interest; (17) that the right of way for the ditch has been assessed against the parties owning the lands through which it passes; (18) that the commissioners did not obtain jurisdiction over all the parties owning lands at the time the classification was made; and (19) that none of the lands in Lee county have been legally included within the district.

The principal contention of the appellee in support of the action of the court in sustaining the motion to strike the objections is, that the several land owners did not have the right to join in making the objections, for the reason that their interests are not identical and that they have no joint interest in the lands sought to be sold. It appears from the application for judgment and sale that the objectors owned separate tracts of land. They all joined in the objections, and under the holding in *People v. Keener*, 194 Ill. 16, this was a proper method of procedure, provided all the objections made applied to the lands of each of the objectors. In that case, in passing upon the question whether, in such a proceeding as this, different owners may properly join in the objections, we said: "Where the objections are identical, and in the absence of anything to show that confusion or embarrassment will be produced by their being permitted to do so, we see no substantial

reason for holding that they may not so join. To hold otherwise would often, in effect, produce a multiplicity of suits and cause delay and unnecessary expense without corresponding benefits." Unless it should be apparent from the objections themselves, when considered in connection with the application, that confusion or embarrassment would be produced by permitting the objectors to join, the court would not be warranted in sustaining a motion to strike them upon that ground.

The court erred in sustaining the motion to strike as to objections 1, 5, 6, 7 and 19. Objection 1 was based upon the charge that after the commissioners had agreed upon a classification it had been so fraudulently changed that it was not in accordance with that decided upon or with what the commissioners had determined to be in accordance with justice and right. Drainage District No. 3 was organized under the statute commonly known as the Farm Drainage act. This act provides, in detail, how the classification of the lands in a district shall be made, requires the commissioners to give notice to all the owners of lands in the district of a meeting at which objections made to the classification may be heard, and provides if the commissioners are satisfied that any injustice has been done in the classification they shall then correct the same in accordance with what is right, but if not so satisfied, that the classification shall be left as first made and an order entered by the commissioners to that effect. From this final determination of the commissioners on the classification of the lands any person who has appeared and objected to the classification may appeal to the county court, and upon such appeal the classification as made by the commissioners shall be reviewed by a jury, who shall have the power to correct or confirm the classification, as in their judgment the evidence shall warrant. If, after a classification has been finally made and determined upon and before any assessment has been made in accordance with it, changes

are fraudulently made in the classification, an assessment attempted to be made upon such classification so fraudulently changed is not valid, and this question may be raised by objection to the tax. It is apparent that any change in the classification must in some degree affect every land owner in the district. Appellee relies upon the case of *Leonard v. Arnold*, 244 Ill. 429, in support of the contention that objection 1 was properly stricken. But in that case it was complained that in the making of the classification the commissioners fraudulently classified their own lands lower than they should have been, and it was held that the charges of fraud merely went to the motive of the commissioners, and was equivalent to the charge that they had made an improper classification from mistake or want of judgment. The objection here is not based upon the ground that the commissioners committed any fraud in making the classification, but that after the same had been made and decided upon it was fraudulently changed.

Objections 5 and 6 are the same. Under these objections proof should have been admitted. Under the constitutional provision relating to drainage, a special assessment can only be made on property benefited by the proposed improvement, and in no case may the assessment exceed the benefits to be derived from the proposed improvement. (*Havana Township Drainage District v. Kelsey*, 120 Ill. 482.) Special assessments are levied by virtue of section 26 of the Farm Drainage act. The act formerly contained a section 27, which provided for an appeal to the county court from any special assessment levied under section 26, but the act was amended in 1901 by striking out section 27, since which time the property owner has no opportunity to be heard on any matter in reference to the special assessment until application has been made for judgment and sale of his lands for delinquent taxes. (*People v. Carr*, 231 Ill. 502.) As the objectors had the right to insist that the total assessments against their lands for the

cost of the proposed improvement should not exceed the benefits, and as this was the first opportunity afforded them to be heard upon that question, the court erred in striking objections 5 and 6.

The only argument made on behalf of appellee in support of this action of the court is, that the interests of appellants are not identical under these two objections, and it is urged that as each tract of land is necessarily in a class by itself, on account of its location, soil, contour, etc., the determination of the question of benefits on joint objections would lead to confusion and embarrassment. A determination whether the assessment exceeded the benefits would not involve a consideration of the different characteristics of the various tracts of land in the district. Those matters were considered and adjusted when the classification was made, and if a classification is properly made each tract of land will bear its proportionate share of the burden of all future assessments. Should an assessment be made in excess of the benefits under a proper classification, each tract of land in the district would be affected at the same time, although, it is true, not in the same proportion. Assuming that the classification is correct, a reduction of the assessment to a point where it would equal the benefits to any particular tract of land would be a reduction to a point that would equal the benefits to every other tract of land in the district. This was such an objection as the various land owners might properly join in making, and upon the hearing the court should hear the proof on the question of benefits and should sustain the objection as to any excess of the assessment above the benefits.

Section 26 of the Farm Drainage act provides that the commissioners, by resolution, shall order such amount of money to be raised by special assessment upon the lands of the district as may be necessary; that they shall then make out a special assessment roll or tax list, and when com-

pleted the list shall be filed with the town clerk. Section 2 of the act provides that the town clerk shall be the clerk of the drainage commissioners and shall be the custodian of all papers and records pertaining to drainage matters, and shall keep in a well-bound book, to be known as the "Drainage Record," a record of the proceedings of the commissioners, and shall enter at length therein all the orders and findings of the commissioners pertaining to the subject of drainage. Before the commissioners are authorized, under section 26, to make out an assessment roll or tax list, they are required to provide for the amount of the assessment by resolution, and this resolution must state that the amount named is necessary. Before they are warranted in making any assessment roll the statute must be strictly complied with. (*People v. Carr, supra; People v. Warren, 231 Ill. 518.*) That the commissioners failed to find that the amount levied was necessary to be raised by special assessment is a valid objection to the collection of the tax, and objectors should have been allowed to make proof under objection 7.

Objection 19 was, that none of the land in Lee county had ever been legally included within the district. While this objection is very general in its terms and should have been more specific, it is one under which legitimate proof might be made. Appellee relies chiefly upon *People v. Dyer*, 205 Ill. 575, and *Shanley v. People*, 225 id. 579, to support the action of the court in striking this objection. Appellants do not have the right, under this objection, to attack the corporate existence of the district, for, as was said in the *Dyer case, supra*, and the *Shanley case, supra*, if they desire to raise such question it must be done by *quo warranto*. In a proceeding to collect a special assessment levied by a drainage district the organization of the district cannot be questioned collaterally, but it can only be done in a direct proceeding. It does not appear from this record how the lands of objectors, being located in Lee

county, became attached to district No. 3 of the town of Montmorency, in Whiteside county. The record is silent as to whether these lands were included at the time of the organization of the district or were subsequently claimed to be annexed under one of the various methods provided by the Farm Drainage act. But no matter under what method it might be claimed these lands became a part of said district No. 3, appellants, under this objection, would have the right, if they could, to show that no record had ever been made including their lands within the district, if they had not been included originally, or, in any event, whether they had been included originally or annexed subsequently to the organization of the district, that they had never been given the required notice of the meeting to hear objections to the classification made by the commissioners. Such proof would show a lack of jurisdiction in the drainage commissioners to levy any tax against the lands of appellants, and as we said in *Payson v. People*, 175 Ill. 267, in passing upon the question whether this could be raised in a collateral proceeding: "The statute required that notice should be given the plaintiff before a right existed to levy the special assessment against his land. Only after due notice to him, as required by the statute, can his land be brought into the district and made subject to the special assessment. To hold that a land owner may be subjected to such an assessment without any notice given or attempted, and without an appearance, would be against every principle of justice and right. The right to levy a tax by which one may be deprived of his property exists by virtue of the statute alone, which must be strictly followed." And it was there held that such an objection was not a denial of the existence of the corporation. As this objection applied to all the lands of appellants it was one in which they could properly join.

All the remaining objections were properly stricken. Objections 2 and 13 simply state that after the assessment



was made two of the commissioners "signed a paper" that the classification was not in accordance with justice and right and that the proposed improvement was for a larger ditch than was necessary. By section 21 of the act provision is made whereby the commissioners may make a new classification in accordance with justice and right when they believe, from experience and results, that the former classification was not fairly adjusted on the several tracts of land according to benefits. This determination must be arrived at in a regular meeting of the commissioners and a record of it made and preserved. Having once arrived at this determination in this manner, it is then incumbent upon the commissioners to make a new classification. A classification, unless regularly made, cannot be changed or affected except in the method provided in the act. Any written statement made by the commissioners, or a majority of them, in any other method than that provided by the statute, would have no effect whatever upon the classification or on any assessment levied thereafter.

Objection 3, that a majority of those who had paid the assessment signed a statement that the classification was not in accordance with justice and right, would not admit of proof. The land owners had the right to be heard as to the final adoption of the classification, and when once adopted it could only be changed by the commissioners in the method pointed out by the statute.

Objection 4 states that Drainage District No. 3, after its organization, had become absorbed by another district and thereby lost its corporate identity. This is an attack upon the corporate existence of the district and can only be made in a direct proceeding. *People v. Dyer, supra; Shanley v. People, supra.*

Objections 8 and 9 pertain to matters which could have been raised at the time of the hearing of objections to the classification.

Objections 10, 17 and 18 do not disclose that any of appellants would in anywise be affected should they be able to prove the matters therein charged. It does not appear that there is any necessity for any bridges over ditches of any of the lands of the appellants, or that any ditches for which it was necessary to condemn the right of way extended over lands of appellants or any of them. Nor is it pointed out in objection 18 over which of the parties the commissioners failed to obtain jurisdiction.

The assessment is made in the form provided by the statute, and shows on its face that it is not subject to objection 11.

Objection 12 does not state a proper ground of objection to the tax. The provisions of the Farm Drainage act which require drainage commissioners to provide outlets of ample capacity for the waters of the district are mandatory, and the commissioners may be compelled by *mandamus*, in a proper case, to perform their duty in that respect. (*Peotone Drainage District v. Adams*, 163 Ill. 428; *Langan v. Drainage District*, 239 id. 430.) The fact that the drainage commissioners may have failed to provide an adequate outlet for the system of drainage should not operate to defeat the whole purpose of the organization of the district. If it be the case that the outlet is inadequate, the appellants have their remedy and may compel the commissioners to provide one which will be adequate.

Objection 14 is answered by the record itself. The certificate of the county collector that the assessments are delinquent shows them to be past due, and there is no need of any further statement of that fact.

As to objection 15, it is only necessary to state that the Farm Drainage act does not provide for the confirmation of an assessment. It might be contended that the assessment is confirmed when it is made by the commissioners and the assessment roll is filed with the town clerk, as provided by the act, and that this objection was intended to

mean that there is no proper record showing the making of the assessment and the filing of the assessment roll. If that is the basis of the objection those facts should have been specifically stated.

By objection 16 appellants seek to show that the delinquent list does not provide for the collection of any interest on the assessments. Section 29 of the act provides that such taxes shall draw interest at the rate of six per cent from the time that they become due until they are paid, and that such interest may be collected as part of the taxes. If the county collector has not seen fit to require the payment of the interest due on the delinquent tax that action could only result beneficially to appellants and does not afford them any grounds for an objection to the collection of the tax.

The judgment of the county court is reversed and the cause remanded.

*Reversed and remanded.*

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THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellee, *vs.*  
E. NOYES, Appellant.

*Opinion filed December 21, 1911.*

1. EJECTMENT—*what does not destroy possession by a railroad company up to fence.* Possession by a railroad company up to the fence erected with its consent between the right of way and the adjoining land is not destroyed by the fact that a tenant on the land farmed a part of the right of way by permission of the company, or by the fact that the section men did not mow the grass all the way to the fence.

2. SAME—*possession of land is notice of the rights of the possessor.* A non-resident land owner cannot say that he had no notice that a fence was built between his land and a railroad right of way where the resident agent who managed the land for the owner had such notice; but it is not necessary for a railroad company to give notice to a land owner in addition to the building of a fence, as the company's possession is notice of its rights.

3. *SAME—what does not constitute color of title.* A condemnation judgment for a right of way sixty-six feet wide, containing 2.46 acres, across a certain described eighty-acre tract is not color of title, neither is a receipt for the money paid in satisfaction of the judgment, which does not describe the particular property and purport to convey title; but the judgment and receipt show the purchase of the right of way of the width described, and if the purchase is followed by uninterrupted and adverse possession of the right of way for twenty years the company will acquire title.

4. *SAME—fact that the fee cannot be acquired by condemnation does not preclude acquiring title by limitation.* The provision of the constitution that where property is taken by condemnation the fee shall remain in the owner subject to the use for which it was taken, does not prevent a railroad company from acquiring a title to land by adverse and uninterrupted possession for twenty years.

5. *APPEALS AND ERRORS—when objection that plea was not verified comes too late.* A cross-error based upon the fact that a plea in ejectment denying possession or claim of title was not verified cannot be considered where the case was tried on the pleadings as they stood, without any objection being made to the plea.

6. *PROPOSITIONS OF LAW—the Practice act contemplates propositions based upon the evidence.* The propositions of law contemplated by the Practice act are those stating rules of law based upon hypotheses of fact which the evidence tends to prove.

APPEAL from the Circuit Court of Coles county; the Hon. M. W. THOMPSON, Judge, presiding.

JAMES VAUSE, JR., for appellant.

JAMES W. & EDWARD C. CRAIG, (JOHN G. DRENNAN, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, the Illinois Central Railroad Company, brought this suit in ejectment against appellant, E. Noyes, in the circuit court of Coles county, to recover the possession of a strip of land eight feet wide, the south line of the strip being twenty-five feet north of and parallel with the center line of the railroad track and the north line

thirty-three feet north of said center line, and extending across the east half of the north-west quarter of section 24, town 12, range 7, in said county, claiming title in fee. The appellant pleaded not guilty as to lots 5, 6, 9 and 10 in Noyes' Fifth addition to the city of Mattoon, a part of said strip which lies east of a street of the city of Mattoon running north and south through the eighty-acre tract, and denying that he was in possession of the remainder or claimed any interest therein. A jury having been waived, there was a trial by the court and a judgment in favor of the appellee.

The plaintiff is the owner of the railroad originally constructed by the Grayville and Mattoon Railroad Company, which filed its petition in the county court of Coles county on May 4, 1877, for the condemnation of the right of way sixty-six feet wide across said east half of the north-west quarter of section 24, containing 2.46 acres. A plat of the land to be taken was filed with the petition, but it was not found when this case was tried. Francis V. Noyes was the owner of the land and lived in Massachusetts, and Thomas P. C. Lane, who lived at Mattoon, was his attorney in fact. A trial by jury resulted in a verdict fixing the compensation for the land taken, and the damages, at \$1100. Soon afterward the railroad company went into the hands of a receiver, who took possession of the right of way upon his appointment. The receiver settled the judgment for \$660, and paid that amount on March 2, 1878, in full payment and satisfaction thereof. The receipt stated that the receiver was authorized to vary the line of the road as established and condemned, not exceeding sixty-six feet either way. The receiver constructed the road, but the right of way was not fenced at that time. The eighty-acre tract was rented by Francis V. Noyes, through Lane, his agent, to William H. Stover in 1882. Stover used the land north of the right of way for a cow pasture, and needing a fence asked Lane to build one. Lane said

that he did not feel like putting in a fence and that it was up to the railroad company to build one. The Peoria, Decatur and Evansville Railroad Company then owned the road and Stover applied to the agent of that company to build a fence. The agent said the company did not have to build a fence inside of the corporation, but it was agreed that the company should furnish the material and Stover should build the fence. The material was furnished and delivered on the ground by the railroad company and a fence of posts and barbed wire was built, which remained until 1905, although it was in poor condition at that time, and was then torn down by the defendant, E. Noyes, who had a deed of the land north of the north line of the right of way. The disputed question of fact in the case related to the location of that fence. The evidence for the plaintiff was that it was built thirty-three feet from the center line of the railroad, measured with a tape line at right angles from said center line by Stover and the section boss, and there was evidence for the defendant that the fence was only twenty-five feet north of said center line. After the defendant tore down the fence a row of right-of-way posts were set thirty-three feet from the center of the track and defendant pulled them up, after which this suit was begun. Three or four years before the trial the defendant set out a row of trees twenty-five feet from the center line of the railroad track. There was a row of telegraph poles about twenty or twenty-one feet from the center of the track, and there was testimony for the defendant that the fence was two or three feet north of that line, but one witness, at least, was evidently mistaken. He made a plat of the land for the agent, Lane, in 1893, with the expectation of subdividing and selling, and he testified that there was a board fence twenty-five feet from the line, and that it was a solid plank fence and probably one-third or one-quarter of it was still left at that time. For the plaintiff there was testimony that there was a roadway between the telegraph

poles and the fence, and it is certain that the fence was a barbed wire fence. Judging from the record, there was a clear preponderance of the evidence for the plaintiff as to the location of the fence, and it would be strange if a railroad company which had bought and paid for a right of way sixty-six feet wide should locate its fence twenty-five feet from the center line instead of thirty-three feet. The plaintiff returned to the State Board of Equalization its right of way sixty-six feet wide at this place for assessment and paid the taxes on it from the year 1881 to 1910, inclusive. After the fence was built Stover farmed the right of way during the three years of his tenancy by consent of the section boss, but that fact had no influence on the rights of the parties, because the possession of Stover was by permission and in subordination to the right of the railroad company. There was testimony that the section men mowed the grass for only twenty-five feet from the track, but if that were true it would not destroy the possession up to the fence. The finding of the court was not contrary to the evidence.

The condemnation judgment did not constitute color of title in the railroad company, (*Converse v. Calumet River Railway Co.* 195 Ill. 204; *Chicago, Burlington and Quincy Railway Co. v. Abbott*, 215 id. 416;) and neither did the receipt for the money paid in satisfaction of it, which did not describe particular property or purport to convey title. The plaintiff, therefore, could not recover by virtue of the Statute of Limitations of seven years. The judgment and receipt, however, did show that the railroad company paid for a right of way sixty-six feet wide across the eighty-acre tract, containing 2.46 acres, which was the amount of land included in a right of way of that width. The settlement and payment amounted at least to an agreement on the compensation for the right of way and a payment of it. The title of the plaintiff rested upon the fact of the purchase of the right of way, followed by uninterrupted

and adverse possession of it for twenty years. The argument that such possession was not adverse because there was no evidence that Francis V. Noyes knew of the building of the fence is not sound. His agent at Mattoon, who was applied to by Stover to build the fence and who was in charge of the property, necessarily had actual knowledge of the existence of the fence on the land, and his knowledge would be imputed to his principal. But it was not necessary for the railroad company to give notice to Noyes in addition to the existence of the fence on the land. Possession of land is notice of the rights of the possessor. *Lyman v. Russell*, 45 Ill. 281; *Jefferson v. Jefferson*, 96 id. 551; *Ronan v. Bluhm*, 173 id. 277.

The defendant asked the court to hold as law the following proposition:

"The court holds that to constitute an adverse possession sufficient to defeat the party who has the legal title, the possession must be hostile in its inception and so continue without interruption for the period of twenty (20) years. It must be an actual, visible, open, notorious, hostile and exclusive possession, acquired and retained under claim of title inconsistent with that of the true owner."

The court marked the proposition "refused." The proposition was abstract in form, and although it was held in *Vigus v. O'Bannon*, 118 Ill. 334, that such a proposition, if correct, should be held where the trial is by the court, it was undoubtedly intended by the Practice act that such propositions should state rules of law based upon hypotheses of fact which the evidence tends to prove. In this case the court must have regarded the proposition as not applicable to the facts, since it cannot be supposed that the court did not recognize the statement as correct when properly applied. Francis V. Noyes, who owned the land, had sold the right of way to the railroad company and received pay for it and the defendant had acquired title by his deed to the land north of the right of way, so that, perhaps, the



court did not regard the defendant as the true owner or holder of the legal title to the land in dispute. The proposition may not have been regarded as strictly applicable with respect to taking possession in a hostile manner under the facts of the case with respect to the building of the fence, but the court could not have found for the plaintiff without finding the fact that the fence was thirty-three feet north of the center line of the track, which was the disputed question of fact. If that was so, there was no evidence tending in the slightest degree to prove that possession was taken in subordination to the title of Francis V. Noyes or in recognition of any title in him or by his permission. The possession was taken under a claim of right, if taken at all, and the refusal of the court to hold the proposition could not possibly have affected the judgment.

It is urged that the judgment was wrong in adjudging title in the plaintiff in fee simple, because the constitution provides that where property is taken by condemnation proceedings the fee shall remain in the owner, subject to the use for which it is taken. The defendant contended at the trial, and procured the court to hold a proposition, that the condemnation proceeding was not color of title, and now contends that the plaintiff could only recover by virtue of the twenty-year Statute of Limitations. The provision of the constitution, therefore, does not apply, and it is not contended that the plaintiff was incapable of acquiring title in fee by adverse possession under the Statute of Limitations. As title was not acquired by condemnation proceedings the judgment was not incorrect.

A cross-error is assigned on the failure of the court to adjudge title in fee in the plaintiff to all the land described in the declaration. The ground of that assignment is, that the plea denying possession or claim of title was not verified by affidavit. Perhaps the absence of a verification has been noticed since the trial, but whether that is so or not, no objection of that kind was made. The case was tried

under the pleadings as they stood, and as no question was raised as to the sufficiency of the plea it is too late to make the objection now.

The judgment is affirmed.

*Judgment affirmed.*

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THE CITY OF CHICAGO, Defendant in Error, vs. THE  
PENNSYLVANIA COMPANY, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. MUNICIPAL CORPORATIONS—*police power of city is a continuing one.* The power of a city to enact police regulations demanded for the public health, comfort, safety or welfare is a continuing one, of which the city cannot divest itself by contract.

2. SAME—a city does not have same right to regulate elevated structures as it does grade crossings. The rights of a city with reference to the regulation of the operation of a railroad on an elevated structure are not the same as where the railroad crosses the streets at grade.

3. SAME—city cannot compel a railroad company to light street beneath an elevated structure. A city has no power to compel a railroad company to light the street beneath an elevated structure erected by the company with the authority of the city, even though the structure renders the street darker than it would otherwise be. (*Chicago v. Union Traction Co.* 199 Ill. 259, distinguished.)

4. SAME—Chicago ordinance requiring lights at crossings is invalid as applied to elevated structures. Section 1997 of the municipal code of Chicago, concerning lights at crossings, is invalid in so far as it applies to railroads which cross above the streets on elevated structures.

WRIT OF ERROR to the Municipal Court of Chicago;  
the Hon. SHERIDAN E. FRY, Judge, presiding.

LOESCH, SCOFIELD & LOESCH, for plaintiff in error:

The track elevation ordinance of June 18, 1900, is a contract between the city of Chicago and the Pennsylvania Company and cannot be changed without consent of both parties, and additional burdens not provided in said ordi-

nance cannot be cast upon the railroad company except in the reasonable exercise of the police power of the city of Chicago. *Quincy v. Bull*, 106 Ill. 337; *Belleville v. Railway Co.* 152 id. 171; *People v. Telephone Co.* 192 id. 307; *Telephone Co. v. Telephone Co.* 199 id. 324; *Madison v. Traction Co.* 235 id. 346.

Section 1997 of the municipal code is not a valid exercise of the police power of the city of Chicago. *Keil v. Chicago*, 176 Ill. 137; *Landberg v. Chicago*, 237 id. 112; *Cairo v. Bross*, 101 id. 475; *Altamont v. Railway Co.* 184 id. 47.

The ordinance in question is an alleged exercise of police power in the interest of public safety. If the power to impose the burden of lighting a street intersection upon the railroad exists when it crosses a street at grade, it ceases when the said railroad is elevated and the dangers of the grade crossing are eliminated. *Blanchard v. Railroad Co.* 126 Ill. 416; *Railway Co. v. Halbert*, 179 id. 196; *People v. Railroad Co.* 235 id. 374.

A city has no power, in the absence of statutory provision, to pass an ordinance requiring railroad companies to light their tracks within the city limits. *Shelbyville v. Railroad Co.* 146 Ind. 66.

The city having assumed the duty of lighting its streets, cannot, by ordinance, relieve itself of such duty and place the burden upon an individual or private corporation. *Freeport v. Isbell*, 83 Ill. 441.

To put the burden of lighting the subway in question upon the railroad company is the taking of its property for a public use without just compensation. *Railroad Co. v. Bloomington*, 76 Ill. 447.

To permit the enforcement of this ordinance when all lighting is done by general taxation is to deny to the railroad company the equal protection of the laws, in contravention of the constitution of Illinois and the fourteenth

amendment to the constitution of the United States. Sutherland's Notes on U. S. Const. 728.

EDWARD J. BRUNDAGE, Corporation Counsel, (CHARLES M. HAFT, of counsel,) for defendant in error:

A statute or ordinance relating to the health, safety, comfort, convenience or good order of the people of the municipality is a proper exercise of the police power. *Railway Co. v. Chicago*, 140 Ill. 309; *New Orleans v. Louisiana*, 115 U. S. 661; *Beers v. Massachusetts*, 97 id. 32; *Slaughter House cases*, 16 Wall. 62; *Wilke v. Chicago*, 188 Ill. 414; *People v. Railway Co.* 200 U. S. 561; *Thorpe v. Rutland*, 27 Vt. 149.

An ordinance requiring a railroad company to light a crossing relates to the health, safety, comfort, convenience and good order of the community, and it is therefore a proper exercise of the police power. *Village v. Railroad Co.* 60 Ohio St. 136; *Railroad Co. v. Sullivan*, 32 id. 152; *Railroad Co. v. Crawfordsville*, 72 N. E. Rep. 1025.

Independently of any statutory authority, a city has implied power to protect the health, safety and comfort of its inhabitants. *Gundling v. Chicago*, 176 Ill. 340.

Requiring a railroad company to light that portion of the street beneath its elevated structure is a reasonable regulation by the city of the use of its streets. *Baltimore v. Railroad Co.* 166 U. S. 681.

The principles involved in this case are practically identical with those involved in *Chicago v. Traction Co.* 199 Ill. 259, and we submit that that case is decisive of the questions here involved.

Mr. JUSTICE COOKE delivered the opinion of the court:

The city of Chicago brought suit against the Pennsylvania Company in the municipal court to recover a penalty for failure to maintain lights in the subway over which the lines of said railroad cross Twenty-second street, in the city

of Chicago. The city based its right to recover on section 1997 of its municipal code of 1905, which is as follows:

"1997. *Lights at crossings.*—Every person or corporation owning or operating any steam, elevated or street railway whose track or tracks cross or intersect at, above or below grade any of the streets within the city, shall, and they are hereby required to, provide at their own expense proper and sufficient lights, and care for the same, at all such crossings or intersections. Such lights shall be of such kind as may be approved by the commissioner of public works."

Section 1998 provides for a fine of not less than \$10 nor more than \$100 for a failure to comply with the provisions of the preceding section. The city secured judgment in the municipal court and a fine of \$50 was assessed against the railroad company, and this writ of error has been sued out to review the record of the municipal court.

There is no dispute in regard to the facts. For many years prior to 1900 the plaintiff in error or its predecessors had operated a steam railroad on the surface of Stewart avenue, which runs north and south and across Twenty-second street. This occupation of Stewart avenue prior to 1900 was authorized by various city ordinances which are not involved in this proceeding. On June 18, 1900, the city council of the defendant in error passed an ordinance requiring the plaintiff in error to elevate its tracks from Twenty-first street southwardly to Fifty-third street. This ordinance provided for subways to be constructed by plaintiff in error in certain streets, among which was Twenty-second street. The character of the subway provided for in Twenty-second street was specified in the ordinance, and it has been constructed in accordance therewith and accepted by defendant in error. The distance from the surface of the roadway to the railroad structure above is 13.5 feet. The evidence shows that as a result of the overhead crossing the street beneath the same is somewhat darkened

in the daytime and is rendered darker at night than it otherwise would be; that lights are required in the said subway to protect the public from the danger of collisions, and also from the danger of coming in contact with iron posts erected in the roadway to support the superstructure of the railroad; that after the completion of the elevation of its tracks in 1908 plaintiff in error maintained lights in said subway until January 15, 1909, when it ceased to light said subway and has since refused to do so. Plaintiff in error offered to prove that defendant in error appropriated a large sum of money annually for street lighting and that plaintiff in error had paid the taxes assessed against it for such purposes. This evidence was excluded by the trial court.

Plaintiff in error contends that the track elevation ordinance of 1900, when accepted and complied with by it, became a contract, which cannot be changed without the consent of both parties, and that defendant in error cannot cast additional burdens upon it unless it be in the reasonable exercise of the police power; that even if the power to impose the burden of lighting the street intersections exists when it crosses a street at grade, it ceases when the railroad is elevated and the dangers of the grade crossing are eliminated; that defendant in error has no power, in the absence of a statutory provision, to pass an ordinance requiring railroad companies to light their tracks within the city; that the defendant in error having assumed the duty of lighting its streets, cannot relieve itself of such burden by an ordinance placing the burden upon the railroad company; that to place the burden of lighting this subway upon the railroad company is a taking of its property for public use without just compensation and is a denial to the company of the equal protection of the laws, in violation of both the State and Federal constitutions.

If the city has the right to impose this duty upon plaintiff in error it is only because of the general police power

possessed by it. No express grant has been given by the State which authorizes it to require a railroad company to maintain lights at any particular place. There is, however, a general police power possessed by the city by which all persons, natural or artificial, may be subjected to such reasonable restrictions and requirements as are found to be proper and requisite to secure the health, comfort and convenience of the people. (*City of Chicago v. Union Traction Co.* 199 Ill. 259.) The general police power thus possessed by a city is a continuing power, and is one of which a city cannot divest itself, by contract or otherwise. It follows, therefore, that if the defendant in error has the right to impose this duty upon plaintiff in error as a valid exercise of its police power, the contention that the track elevation ordinance constitutes a contract which is violated by section 1997 of the municipal code cannot be sustained. Whether, in any event, a city has the power, without an express grant from the legislature, to require railroads to maintain lights at grade crossings is argued at considerable length. In the view we take it is not necessary to determine that question. The railroad does not cross Twenty-second street at grade. The conditions there are essentially different from those of a grade crossing, and the rights of the city in reference to the regulation of the operation of a railroad on an elevated structure are not the same as at grade crossings. This was recognized by the city when it provided in the elevation ordinance that when the railroad should be operated on the elevated structure the provisions of all the ordinances of the city of Chicago relating to the speed of trains, the length of trains, the number of cars to constitute a train, and the maintenance of gates, flagmen, watchmen, signals and signal towers, and the ringing of bells, should cease. Even if the power exists in the city to require railroads to furnish lights at grade crossings, it would not necessarily follow that it existed when the grades had been separated and the railroad was being operated on

an elevated structure. The statute requiring a bell to be rung for eighty rods before reaching a crossing has no application to a crossing under a viaduct, where the travel is over the elevated structure and is out of the way of the trains passing over the tracks. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Halbert*, 179 Ill. 196; *Blanchard v. Lake Shore and Michigan Southern Railway Co.* 126 id. 416.

In *People v. Illinois Central Railroad Co.* 235 Ill. 374, the city of Chicago sought by *mandamus* to compel the railroad company to reconstruct the pavement and repair the sidewalks in a subway in one of the streets in the city which passed under the elevated structure of the railroad company. In that case the railroad company had been required to elevate its tracks by an ordinance of the city, and at the subway in question was required by the elevation ordinance to pay for the cost of constructing suitable approaches to the depressed street and of paving the street under the railroad tracks and the approaches thereto, and to construct suitable sidewalks. The city had repeatedly notified the railroad company that the pavement and sidewalks in the subway had become so worn as to be unsafe and to require immediate reconstruction, and demanded that it reconstruct the pavement and repair the sidewalks. This the railroad company refused to do and a petition for the writ of *mandamus* was filed by the city. The city in that case contended that it had the right, in the exercise of its police power, under section 8 of the act in relation to fencing and operating railroads, to require this to be done by the railroad company. In passing upon that question we said: "Here the street in question did not cross the railroad tracks but passed under them. Appellee [railroad company] is required to maintain its structures supporting the tracks in such condition as to render it safe for persons and property passing underneath them, but nothing it could do in the way of maintaining and re-paving the streets



would afford any protection from trains to persons or property passing underneath its tracks. It is not denied that when the appellee elevated its tracks it restored the streets and sidewalks to proper condition, and in our opinion its duty ended there. The future maintenance of the streets was not imposed upon the corporation by its charter nor by any law passed in the exercise of the police powers of the State." While the precise question to be determined here was not involved in that case, the facts are analogous and the reasoning in that case applies here.

The police power is limited to the enactment of laws demanded for the public health, comfort, safety or welfare of society. (*Ruhrstrat v. People*, 185 Ill. 133.) By elevating its road-bed and separating its grade from the grade of the street all danger of collisions between trains of the plaintiff in error and persons or property was entirely eliminated. In passing along the street in the subway beneath the tracks of plaintiff in error no danger is encountered by reason of the operation of the trains of plaintiff in error. Under the exercise of the police power the only excuse which could be given to support the right of the city to require plaintiff in error to maintain lights in this subway would be, that the same were necessary for the protection of the public on account of the operation of the railroad through the running of its trains. That the public is no longer in danger because of the operation of the trains of plaintiff in error is conceded. It is only contended that defendant in error has the right to require plaintiff in error to maintain lights at this subway because the building of the structure required by the elevation ordinance has darkened the street. Plaintiff in error has a right to maintain its tracks across Twenty-second street by reason of the license given it by defendant in error to do so. Under the elevation ordinance it had a right to erect the structure it has erected across Twenty-second street. The city has no more right to require plaintiff in error to maintain lights

in this subway merely for the reason that its structure has tended to darken the street, than it has to require the owners of buildings along the line of any street to keep the street lighted because the buildings, on account of their height, have tended to darken the street and make it less safe for travel. To require plaintiff in error to maintain such lights would be to deny it the equal protection of the laws.

Defendant in error, in support of its contention, relies chiefly upon the case of *City of Chicago v. Union Traction Co. supra*. But that case is of no controlling force here. In that case it was clearly shown that the street accumulations had a deleterious effect upon the public health and comfort, and that on account of the manner in which the road-bed was constructed and the rails were laid in the street, the dirt and filth had a tendency to collect between the rails and be retained there. As the existence of the rails in the street and the peculiar construction of the road-bed tended to retain the street accumulations and prevent them from flushing off to the sides of the street, it was properly held that the city had the power, under the exercise of its police power, to require the traction company to remove such accumulations. The decision of the case rested upon the fact that the rails caused an accumulation and retention of agencies of disease which were injurious to the public health.

Section 1997 of the municipal code, in so far as it applies to railroads crossing on elevated structures above the grades of streets, is invalid.

The judgment of the municipal court is reversed.

*Judgment reversed.*

MARY E. LAWLER *et al.* Appellees, *vs.* JAMES J. BYRNE,  
Appellant.

*Opinion filed December 21, 1911.*

1. JOINT TENANCY—*joint tenancy of husband and wife is same as any other joint tenancy.* Since the passage of the Married Woman's act the common law rule that a deed to husband and wife created in them a tenancy by the entirety, which could not be severed by a conveyance by one of them to a stranger, has ceased to be the law in Illinois, and a joint tenancy of husband and wife is now governed by the rules applicable to other joint tenancies.

2. SAME—*joint tenancy of husband and wife is severed when one conveys his or her interest to a stranger.* A joint tenancy, even though the joint tenants are husband and wife, is severed when one joint tenant conveys or mortgages his or her interest to a stranger. (*Mette v. Feltgen*, 148 Ill. 357, explained.)

3. SAME—*deed of one joint tenant not joined in by the other is not void.* A deed by the wife conveying to a stranger her interest in property in which she and her husband were joint tenants is not void because the deed was not joined in by the husband.

APPEAL from the Superior Court of Cook county; the Hon. MARTIN M. GRIDLEY, Judge, presiding.

WILLIAM SCHWEMM, for appellant.

WHITE & WILSON, and CHENEY & EVANS, (ROY A. JUUL, of counsel,) for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a decree of the superior court of Cook county for the partition of two lots in the city of Chicago, described in the bill. Appellees were complainants in the bill for partition. Annie E. Byrne was married twice and appellees are her children by the first marriage. They claim an interest in the premises by virtue of a warranty deed from their mother, in which her second husband, the appellant, who is the step-father of appellees, did

not join. The deed was executed December 31, 1910. The bill alleges that Annie E. Byrne and appellant, her husband, were the owners in fee simple, as joint tenants, of the said two lots; that lot 8 was occupied as a homestead by appellant and his wife until her death, which occurred January 3, 1911, and was worth at the time the deed was made to appellees, more than \$3500; that the other lot is vacant and unoccupied. The bill alleged, in substance, that appellees, by virtue of the deed from their mother, the wife of appellant, became seized in fee simple, as tenants in common with appellant, of the undivided one-half of said two lots, subject to the right of homestead of appellant in lot 8, and appellees tendered in their bill to appellant \$1000 for and in lieu of his homestead estate, if it should be ascertained that the homestead premises were so situated that they could not be partitioned and appellant's homestead assigned therein. The bill further alleged that the appellant, prior to the conveyance made by his wife to appellees, had the right of survivorship in the event of his wife's death but had no right of dower in or to any portion of the premises vested in his wife, and that by virtue of the deed to appellees the joint tenancy was severed and the undivided one-half of the premises passed to appellees free from any dower right of appellant. Appellant demurred to the bill. The demurrer was overruled, and, he electing to stand by his demurrer, a decree for partition was entered in accordance with the prayer of the bill and commissioners were appointed to make partition and assign homestead to appellant, if the premises were so situated that partition could be made and homestead assigned, and if the same could not be done, the commissioners were directed to fairly and impartially appraise the value of the premises and report to the court. From that decree this appeal is prosecuted.

Both parties in their briefs say it is agreed between them that the appellant and his deceased wife were joint tenants of the premises described in the bill, and that they

acquired their title as joint tenants to one of the lots in 1905 and to the other in 1909. The instruments creating the joint tenancy are not before us. The only question raised and discussed by appellant in his brief is the right of his wife to sever the joint tenancy by conveying her interest in the premises to appellees. Appellant insists that she could not do this; that her deed to appellees was void and upon her death the whole of the premises vested in her husband, as survivor.

Appellant's position is based upon the assumption that a deed to husband and wife creates in them a tenancy by the entirety, which was the rule at common law, and such a tenancy could not be severed. The authorities are abundant that a joint tenancy may be severed by one of the joint tenants conveying or mortgaging his interest to a stranger. (2 Blackstone, 185; 4 Kent's Com. 362, 363; Washburn on Real Property,—5th ed.—682; *Wilkins v. Young*, 144 Ind. 1, and cases there cited; *Simpson's Lessee v. Ammon*, 1 Binn. 175; 2 Am. Dec. 425; *Bassler v. Rewolinski*, 130 Wis. 26; 7 L. R. A. (N. S.) 701; *Barden v. Overmeyer*, 134 Ind. 660; 23 Cyc. 487, 895; 17 Am. & Eng. Ency. of Law,—2d ed.—708.) Unless, therefore, the common law rule still prevails as affecting a conveyance to husband and wife, the court did not err in decreeing that the deed by appellant's wife severed the joint tenancy and vested the undivided one-half of the premises in appellees.

In *Mittel v. Karl*, 133 Ill. 65, the court, in discussing the common law rule applicable to a conveyance to husband and wife, said: "This rule is predicated upon the principle that in law husband and wife are but one person, and hence cannot take an estate by moieties, but both are seized of the entirety, so that neither can dispose of the estate without the consent of the other, but the whole must remain to the survivor." But the court said the reason for this rule ceased with the adoption of the Married Woman's act of 1861. After the adoption of that act conveyances to hus-

band and wife created in them a tenancy in common, unless the instrument vesting the estate in them expressly declared that the estate should not be a tenancy in common but a joint tenancy. Tenancy by the entirety therefore ceased to exist after the disabilities of married women were removed, and a joint tenancy in husband and wife is governed by the same law applicable to a joint tenancy of persons occupying different relations.

In *Mette v. Feltgen*, 148 Ill. 357, this court held that a conveyance made in 1878 to a husband and wife, not as tenants in common but as joint tenants, created in the grantees an estate in joint tenancy, "with its common law incidents." Some reliance is placed on the expression "with its common law incidents," and it is argued from that expression that one of the incidents, at common law, of an estate created by a conveyance to husband and wife was that there could be no severance. This, as we have seen, was because of the legal status of the wife at common law. The husband and wife were seized, not as joint tenants but as tenants by the entirety, and therefore no right of severance existed. It is quite apparent from reading the opinion, that the court, in using the language it did, was referring to the right of survivorship as applied to all joint tenancies, no matter what the relation of the parties, and not to the common law incidents of tenancy by the entirety.

It is also contended by appellant that "the deed from Annie E. Byrne to the appellees is void because it was not joined in by her husband, the appellant." This has not been the law in this State for many years. *Thompson v. Minnich*, 227 Ill. 430.

No other objection to the decree having been raised or discussed in appellant's brief, the decree of the superior court is affirmed.

*Decree affirmed.*

CARRIE PATE, Appellee, vs. GUS BLAIR-BIG MUDDY COAL COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. **APPEALS AND ERRORS**—*when a constitutional question is involved.* Where the trial court, in an action under the Mines and Miners act, construes sections 16 and 18 of said act as applying to certain conditions and renders judgment against the defendant which violates its constitutional rights if the statute cannot constitutionally be given such construction, a constitutional question is involved and Supreme Court has jurisdiction of a direct appeal.

2. **PRACTICE**—*when motion for new trial is not necessary.* The weight of the evidence in an action at law cannot be questioned on appeal in the absence of a motion for new trial, but a motion to direct a verdict raises only the legal question whether there is any evidence legally tending to sustain the verdict, and the court's action on such motion is presented for review though no motion for new trial is made.

3. **MINES**—*the Mines and Miners act was passed in obedience to constitutional mandate.* The Mines and Miners act was passed in obedience to the mandate of section 29 of article 4 of the constitution, which recognizes the dangerous character of the occupation of miners and requires legislation specially for their protection, and the Mines and Miners act must therefore be liberally construed.

4. **SAME**—*it is only physical conditions which make a working place unsafe which must be marked.* Under section 18 of the Mines and Miners act, concerning the examination of mines, it is only physical conditions which make a working place dangerous that the mine examiner is required to observe and mark. (*Dunham v. Black Diamond Coal Co.* 239 Ill. 457, and *Spring Valley Coal Co. v. Greig*, 226 id. 511, explained.)

5. **SAME**—*when section 18 of the Mines and Miners act does not apply.* Alleged defects in the rope haulage system in a mine, consisting of broken balance wheels, worn friction blocks and defective drums, do not affect the physical condition of the working place of a trip-hauler several hundred feet from such machinery, and they are not, as to such trip-hauler, among the dangerous conditions which the mine examiner must observe and mark.

6. **SAME**—*statute does not expressly require mine examiners to examine machinery.* The statute expressly requires mine examiners to be competent to examine the ventilation of a mine and the

condition of the working places, but it does not require them to know anything about, or be competent to, examine, engines, machinery or other apparatus, nor does it expressly require them to make an examination thereof.

APPEAL from the Circuit Court of Jackson county; the Hon. A. W. LEWIS, Judge, presiding.

DENISON & SPILLER, JAMES H. MARTIN, and OTIS GLENN, (MASTIN & SHERLOCK, of counsel,) for appellant.

W. A. SCHWARTZ, and JOHN M. HERBERT, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The appellee recovered a judgment in the circuit court of Jackson county against the appellant, the Gus Blair-Big Muddy Coal Company, on account of the death of her husband, Arlie Pate, and an appeal has been prosecuted directly to this court upon the ground that the constitutionality of a statute is involved.

A motion made by the appellee to dismiss the appeal was taken with the case. The action was founded upon the alleged negligence of the defendant in respect to the engine, machinery and appliances known as the "rope haulage system," whereby cars loaded with coal were hauled through certain entries and roadways to the bottom of the mine and were returned empty to be again filled. The declaration was based upon the Mining act, and in each of its three counts attempted to charge a willful violation of sections 16 and 18. The first count charged a willful failure and neglect to cause the dangerous places and conditions to be marked where the balance wheels of the engine had been broken and the engine was run without balance wheels; where certain friction blocks used to apply to the drums had become worn and permitted the drums to slip; where the wire rope would not wind properly on the drums but would become "balled up," and would thereby be caused to vibrate



unduly; where the clevis and pin whereby the rope was attached to the cars had become worn, so that the clevis would readily become detached. The second count charged that the defendant willfully permitted the deceased to enter the mine and become a trip-rider therein, not under the direction of the mine manager, while the dangerous conditions above mentioned, except that relating to the clevis and pin, had not been made safe. The third count charged a willful failure to have the mine examiner visit and inspect the mine and observe the dangerous conditions above mentioned and mark them as unsafe places. It is the contention of the appellant that sections 16 and 18 do not apply to the dangerous conditions mentioned, and that so applied they would be unconstitutional, because such dangers do not come within the unusual or known extraordinary hazards of the mining business which justify the enactment of laws affecting the persons engaged in that business, but are only such as are common to other occupations and as to which the law must apply equally to all persons affected. The circuit court held that those sections did apply to defects and dangers of the character mentioned and therefore rendered a judgment against the appellant, which violated its constitutional rights if the sections could not be constitutionally construed to apply to its case. The constitutional question is thus involved and the motion to dismiss the appeal must be denied.

The only assignment of error argued by the appellant is, that the court erred in refusing to exclude the evidence and direct the jury to find it not guilty. The appellant made no motion for a new trial, and it is insisted by the appellee that the question argued cannot be considered on appeal. The practice in this respect was considered in *Yarber v. Chicago and Alton Railway Co.* 235 Ill. 589, where we said (p. 603): "Under the practice in this State, decisions of the court made in the progress of a trial upon instructions, objections to evidence or other matters of law arising

in the cause, which have been incorporated in a bill of exceptions, may be assigned for error and reviewed by an appellate court without any motion for a new trial." The weight of the evidence cannot be questioned, but a motion to direct a verdict raises only the legal question whether there is any evidence legally tending to sustain the verdict.

The facts which the evidence tends to show are, that the appellant was operating a coal mine with a shaft about 150 feet deep, and an entry extending from the bottom of the shaft several hundred feet to a double switch, where the pit cars loaded with coal were collected, to be transported to the bottom of the shaft. In this entry was a rope haulage system, consisting of a steel wire cable about 2600 feet long and a steel tail-rope about 5000 feet long. The system was operated by a double cylinder steam engine located about 40 feet from the bottom of the shaft, containing two drums, upon one of which the main cable was wound and upon the other the tail-rope. The main cable extended from the drum, over certain sheave wheels and rollers, to the double switch, where it was connected to the front end of the trip of loaded cars to be hauled to the bottom of the shaft. Attached to the end of it was a steel chain about eight feet long, in the end of which was a ring. A single link extended about ten inches from the end of the car. The ring in the end of the chain was attached to the link by a large clevis and pin. This pin was constructed with a circular hand-hold at the upper end and a swell at the lower end, so that a person handling the clevis could take hold of the pin at the hand-hold and pull it out of the lower eye of the clevis but could not pull it out of the upper eye because of the swell at its lower end. The tail-rope extended from the other drum of the engine, along the side of the entry, over certain sheave wheels and hangers, to the end of the system, where it went over a large sheave wheel, called the "bull wheel," and back along the entry to the double switch, where it was attached to the

rear end of the trip of cars. The cars were loaded in the various working places and hauled by the drivers to the double switch, where they were stored until they could be conveyed to the bottom of the shaft. A trip consisted of from ten to fifteen loaded cars, which were under the control of a trip-rider, whose duty it was to see that the cars were properly coupled together, to connect the tail-rope to the rear and the main hauling rope to the front end of the trip, and to remain at the front of the trip and hold his hand on the clevis pin, after he connected up the main hauling rope, until he gave the signal to the engineer to start and the engineer had started the engine and tightened the rope, because there was always some jerking of the cable, which might jar the clevis and pin out of their proper position. As the trip passed the trip-rider he would take his seat on the back end of the last car on a seat provided for that purpose. There was a system of wires extending from the double switch, along the side of the entry, to the engine room, and the trip-rider, by tapping the wire at any point, could ring a bell in the engine room and thereby signal the engineer. Attached to the last car of each trip was a pronged iron rod, which dragged along the ground behind the trip. It was placed there so that if the hauling cable should become disconnected on the incline it would derail the last car and prevent the trip from running back down the incline. On the inside of the rim of the master wheel, between the two drums of the engine, were bolted, closely together, forty-five or fifty wooden friction or clutch blocks. On the outside of the rim were cogs connecting with a small pinion wheel on the crank shaft, whereby the master wheel was put in motion. The engineer, by means of a lever, could force the drums against the friction blocks and thereby cause them to revolve with the master wheel. On March 31, 1909, Arlie Pate, the deceased, was a trip-rider and had been working in that capacity for the appellant about two years. About ten

o'clock a trip, consisting of twelve loaded cars, was coupled up at the double switch. Pate connected the main hauling cable with the front end of the trip and then walked back to the rear end. The county mine inspector, John C. Duncan, was making an inspection of the mine on that day and was intending to ride out to the bottom of the shaft with Pate on this trip. He took a position on the trip-rider's seat, and Pate, while at the rear end of the trip, gave the engineer the signal to start and then took his position, standing on the tail-rope. As the trip was going up the incline, at a point about 300 feet from the bottom of the shaft, the clevis on the end of the main hauling rope became disconnected and the trip slowed down. The deceased called to Duncan to get in the clear and both jumped to the side of the entry out of danger. The rear car was about six feet up the track from them. The deceased then stepped out from the side where he was standing, towards the approaching cars, placed one hand on the end of the car and stooped over. Duncan called to him to stay in the clear, but the corner of the car struck him and knocked him down and two or three cars passed over him, causing his death.

Section 29 of article 4 of the constitution provides that "it shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation, when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper." This section recognizes the dangerous character of the occupation of miners and requires legislation specially for their protection. The Mining act was passed in obedience to this mandate and is to be liberally construed. Section 18 deals with the examination of mines, and concerns specially ventilation and the safety of places where men are expected to pass or to work. Tools, animals and machinery are not

mentioned. They do not come under any of the terms of this section, unless it is in the expression in clause (a) "or other unsafe conditions," or the expression in clause (b) "or any dangerous conditions" or "until all conditions have been made safe." The first two of these phrases refer expressly to working places, and the context shows that the last refers to nothing else. We held substantially to this effect in *Cook v. Big Muddy Mining Co.* 249 Ill. 41, where we said, on page 47: "The requirement of the statute for a conspicuous mark and a report relates only to working places and their physical condition and does not include other things." The defects alleged in the engine were the broken balance wheels and the worn friction blocks, and it is not claimed that these made the working place at the engine dangerous or affected any particular place in the mine. A mark placed at the engine, where, if at all, the dangerous condition existed, would not have answered any useful purpose, for the place of the deceased's injury was 300 feet away. The defect which prevented the rope from winding properly on the drums is not clearly stated, but if it existed it was at the drums, and a mark placed there would have been no notice to the deceased that his working place was dangerous. The clevis, with its pin, was a simple tool which had no fixed place in the mine. None of these things affected the physical condition of deceased's working place or made any particular part of the mine dangerous.

The character of the examination which the mine examiner is required to make is further indicated by the qualifications which he is required to possess and which are stated in clause (f) of section 7. These concern his experience in mines generating dangerous gases, his practical and technical knowledge of the nature and properties of fire-damp, the laws of ventilation, the structure and uses of safety lamps, and the laws of this State relating to safeguards against fires, from any source, in mines. Mine examiners are not required to know anything about engines, machin-

ery or winding apparatus or to be competent to examine them. The statute expressly requires them to be competent to examine the ventilation of the mine and the condition of the working places. It does not expressly require them to examine engines, machinery and other apparatus, and it is unreasonable to suppose that the legislature, while requiring them to pass an examination as to their qualifications for the duties expressly imposed upon them, intended to impose upon them other duties requiring other special qualifications without requiring them to pass an examination as to their competency for such duties.

In *Dunham v. Black Diamond Coal Co.* 239 Ill. 457, the maintenance of an imperfectly insulated electric wire in an entry through which men were expected to pass in such a position that they were likely to be exposed to contact with it was properly held to be a dangerous condition at that place which it was the duty of the mine examiner to observe and mark.

In *Spring Valley Coal Co. v. Greig*, 226 Ill. 511, an engineer was killed in an engine room on the surface. The engine was used to take cars of coal up an incline to a retail coal dump and bring the empty cars back. It was customary for the engineer to watch the cars as they went up the incline so as to stop them at the right place, and also to watch them as they came down. The engine and its levers were so located in the engine room that in taking a position to watch the cars the engineer's head was within a few inches of the wire cable, which would sway violently if the speed was rapid. It was held that this was a dangerous condition at the working place of the engineer which should have been discovered and marked. The appellant's principal contention there was that the place where the engineer was working and the machinery with which he performed his work did not constitute a part of the mine which the appellant was required by the statute to have examined for the purpose of determining whether the place for em-

ployees to work in was safe. It was held that the engine room and machinery were a part of the mine and the place was one of those required to be examined and marked if dangerous. That case is not inconsistent with the view that it is only physical conditions which make a working place dangerous which the mine examiner is required to observe and mark.

We are of the opinion that while section 18 of the Mining act is not unconstitutional it does not apply to the conditions shown in this record, and the court erred in refusing the peremptory instruction to find for the defendant. The judgment of the circuit court will therefore be reversed.

*Judgment reversed.*

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JOSEPH BEAR, Appellee, vs. B. F. FLETCHER, Appellant.

*Opinion filed December 21, 1911.*

1. **CONTRACTS**—*effect of agreement to convey by warranty deed.* An agreement to convey by warranty deed is a covenant to convey a good merchantable title, however acquired, and is not an agreement to furnish a perfect title of record nor an abstract showing perfect title.

2. **SAME**—*when question involved is not whether an abstract of title is sufficient.* Where the vendor does not agree to furnish an abstract of title showing perfect title but only to convey by warranty deed, the question to be determined, on objection by the vendee to the title, is not whether the abstract of title shows a perfect title, but whether the vendor has proved, by the abstract and other competent evidence, that he was able to convey a merchantable title.

3. **SAME**—*an agreement to convey by warranty deed includes a title acquired by adverse possession.* Where the vendor expressly agrees to furnish the vendee with a perfect title of record and an abstract showing the same, the vendee will not be required to accept a title dependent upon adverse possession; but an agreement merely to convey by warranty deed is fulfilled by conveying good title, however acquired.

4. JUDICIAL SALES—*when discrepancy in name of a minor does not defeat sale of his interest.* A discrepancy in the name of a minor does not defeat a guardian's sale of his interest in land, where process was served upon and the decree of sale was against the owner of the land and no advantage was taken of the discrepancy by plea in abatement.

5. FRAUD—*what is not such a misrepresentation as to value as defeats specific performance.* A representation by the vendor's agent to the vendee, when the latter was inspecting the land, that the land was worth \$60 per acre, is not such fraud as defeats specific performance at the suit of the vendor, even though the land was only worth \$50 per acre.

6. SPECIFIC PERFORMANCE—*when vendor may have part performance and damages.* Where a vendee is to pay a part of the consideration for land in horses, the fact that two of the horses accepted by the vendor died before their delivery to the vendor does not defeat the vendor's right to specific performance in so far as the vendee is able to perform and to damages for the value of the horses which died.

7. SAME—*when suit by vendor is not prematurely brought.* A suit for specific performance begun by the vendor before the time fixed by the contract for delivering possession is not prematurely brought, where the vendee refused to carry out the contract and intimated that the vendor might start suit when he pleased.

8. SAME—*complainant not entitled to interest and also to rent.* In decreeing specific performance it is inequitable to require the defendant to pay interest upon the agreed purchase price from the time he should have performed the contract and taken possession of the land, if the complainant has retained possession and collected the rents and profits for such period.

9. The court reviews the evidence in this case, and holds that it shows a good merchantable title in the vendor, and that the abstract of title, though imperfect in some minor details, shows title in the vendor to all of the premises.

APPEAL from the Circuit Court of Moultrie county;  
the Hon. W. G. COCHRAN, Judge, presiding.

E. J. MILLER, and JOHN E. JENNINGS, for appellant.

THOMAS S. WILLIAMS, JAMES H. SMITH, and W. K.  
WHITFIELD, for appellee.



Per CURIAM: This is an appeal from a decree of the circuit court of Moultrie county granting the specific performance of a contract for the sale of real estate, on a bill filed by the vendor against the vendee. The errors relied on for a reversal are, that appellee's title was not merchantable; that the contract was procured through fraud and misrepresentation as to the value of the land; that the decree is impossible of performance, and that the suit was brought prematurely.

On December 15, 1908, the following contract was entered into between the parties to this suit:

"Articles of agreement made and entered into between Joseph Bear, party of the first part of Edgewood, Illinois, and B. F. Fletcher, party of the second part, of Dalton City, Illinois, this 15th day of December A. D. 1908, the agreement whereas, that said Joseph Bear has bargained to sell, and will sell my farm of 220 acres in section 33, in Effingham county, Illinois, Mason township, for the stated amount \$60 per acre to the said B. F. Fletcher, of Dalton City, Illinois, as follows: B. F. Fletcher pays in horses the amount of \$4400, and said Mart Craig, agent of Joseph Bear, is to inspect the said horses of B. F. Fletcher or reject if said Mart Craig, agent of Joseph Bear, accept these horses of party of the second part then the said party of the second part is to give said party of the first part \$800 cash in hand, making a total sum of \$5200, and then give a mortgage of \$8000 to party of the first part on said above described farm and party of the first part is to make Mr. Fletcher a warrant deed to above described land and it is further agreed that party of the second part is to pay party of the first part five per cent interest on the \$8000. Interest due annually, said mortgage is to be made for the term of five years and that said party of the first part agrees to let party of the second part pay \$100 or any multiple at any interest paying date, party of the first part agrees to give party of the second part possession the first day of March A. D. 1909.

"Entered by and between us this 15th day of December, 1908, before Oscar Hoffman, P. M., *ex-officio* J. P.

B. F. FLETCHER,  
JOSEPH BEAR."

The evidence tends to show the following facts: Joseph Bear, appellee, resides in Edgewood, Effingham county, and B. F. Fletcher, appellant, lives at Dalton City, Moultrie

county. Before the contract was entered into between the parties Fletcher had some negotiations with a Mr. Robnett, who lives at Farina, Fayette county, in regard to exchanging some registered horses which Fletcher owned, for land. On the morning of December 15, 1908, Fletcher went to Farina to look at some land, for the sale of which Robnett had the agency. Upon arriving at Farina appellant was informed by Robnett that the farm that he intended to show Fletcher had been sold and that he had no other lands which he could trade him for his horses. Robnett introduced Fletcher to a real estate agent by the name of M. M. Craig, who resided in Farina and had the agency for the sale of appellee's farm, near Edgewood. Craig and appellant drove over to Edgewood, a distance of about fifteen miles, to the farm of appellee, arriving there in the forenoon. Appellee was not at home when the parties arrived. Craig took appellant to the farm and showed it to him. After looking over the farm appellant and Craig talked over the trade and made a tentative agreement. After looking at the farm the parties returned to appellee's home, and the terms of the agreement between appellant and Craig were stated by Craig to appellee, who assented thereto and procured a notary public who came to appellee's house and reduced the contract to writing, and the writing above set out was then signed by both parties. After the contract was signed appellant returned to his home at Dalton City, accompanied by Craig, who went with him, as the representative of appellee, to inspect and accept the horses which appellant was to let appellee have in part payment for the farm. The horses were examined by Craig on the 16th and accepted for appellee. Appellant delivered the pedigrees of the horses, prize emblems, ribbons, etc., belonging to the horses, arranged with Craig to borrow \$700 from him of the \$800 to be paid in cash under the contract and gave Craig a check for \$100. Craig returned to Edgewood and informed appellee that the horses were satisfactory and that

he had accepted them. On the following day appellee went to Dalton City, taking a note and mortgage for appellant to execute, an abstract of title to the land and a warranty deed executed by appellee to appellant, for the purpose of closing up the transaction. The note was objected to by appellant because it contained a power of attorney authorizing the confession of a judgment thereon. Appellee readily consented that a note might be prepared with the objectionable clause omitted. Appellant remarked to appellee during the conversation, "I suppose the title to that land is all right." Appellee replied that the title was good and that he had an abstract with him, whereupon the abstract was handed to appellant, who took it to the cashier of a bank to be examined. The cashier of the bank declined to pass on the abstract, and thereupon the appellant asked for time enough to have the abstract examined, to which appellee assented. The abstract was then sent by appellant to Mills Bros., a law firm located at Decatur, Illinois, who, after keeping the abstract for several weeks, returned it to appellant with numerous objections noted to the title. The abstract, together with the objections pointed out to it by Mills Bros., was sent by appellant to appellee. Appellee then procured a new abstract to be made to meet the objections pointed out to the first abstract. The new abstract, together with a warranty deed, was submitted to appellant early in February, 1909. The second abstract was submitted to Mills Bros., and on the 23d day of February they returned the abstract to the appellant with a letter, saying: "The present abstract is in much better condition than the old one submitted to us, and while we are of the opinion that Joseph Bear has a merchantable title and he or anyone else can hold the land, yet we feel that under the existing conditions of farm lands and technical perfections of abstracts required in many instances, that the title should be perfected more completely than it has been, and we point out the following as some of the things that should be cor-

rected." Following this general statement the letter suggested six matters in respect to which the abstract should be corrected. Appellant sent this second abstract, together with the objection of Mills Bros., to appellee, and it was received by him on the 25th or 26th of February. In the meantime, on the 24th day of February, appellee filed his bill for specific performance of the contract, but appellant did not know that the bill had been filed until some time afterwards. The evidence shows that before the suit was commenced appellee made a formal tender of a warranty deed and requested appellant to execute the mortgage and carry out the contract, which he refused to do, basing his refusal on the ground that appellee's title was not good.

Between the date of the contract and the commencement of this suit a number of letters were written by appellant, some of them to appellee and others to Craig. All of these letters are in the record, but it will only be necessary to refer at this time to some of the statements contained in appellant's letters.

On the 19th of December, four days after the contract was signed, appellant wrote Craig a letter in which he said: "I had one man examine the abstract and he could not see that there was any title, so I am going to Decatur Monday and see a lawyer and get his opinion in the matter, so I will not ship the horses until about Wednesday, if the title proves all right." Again, on January 1, he wrote Craig, as follows: "I received your letter. I took the abstract to one man. He said there was nothing in it that was right. That put me to thinking, and I took it to Decatur and employed an attorney to look it over, and I have not heard from him is the reason I did not write you sooner. I got a letter from Bear urging me to ship the horses. I thought best not to tell him what I tell you. I got the Shire horse hurt. Was getting him shod. He got bruised under the belly and is now bruised and bleeding and running matter, and I don't know whether we can get him sound in time I

hear from the abstract or not, but rather than have any trouble, if you think best, will let the trade fall through. Of course, if Bear wants the horse in his present condition and the title is right when I hear from it I will ship, but honestly think for his own good he had better let the trade drop. Study over the situation and let me know what you think about it, and advise me if you think best to tell Bear about the Shire horse, and I will then write him and tell him about the Shire horse, as I thought best to write you first."

On January 11 appellant wrote Craig another letter, in which he said: "I have heard a little from the abstract but I am not in a position at this time to note all the objections. Will send the abstract and what I find in a day or two but don't think I can make the trade, and I am about to sell the sorrel horse, and you can send me the pedigrees by express and I will pay for them here at this end. So if you can sell the place, sell it, and don't wait on me one minute, and if you want me to send the abstract to you let me know by return mail and I will send it to Joseph Bear, together with objections noted and what must be done to make the title good."

On January 15 the appellant wrote to the appellee, saying: "Enclosed find objections to title and abstract; get those corrected, and then re-submit abstract for further examination."

On February 12 the appellant wrote Craig again, asking him to return the pedigrees of the horses to him at once, and on the 17th of February he again wrote, telling Craig that he expected to hold him for \$1500 in damages for keeping the papers he had written for. He says: "I have lost the sale of one horse by you not returning those pedigrees when you could not make a sale. As for Bear, he has nothing to do with those horses. Does the contract say so?"

On February 18 the appellant wrote the appellee, saying: "Your letter received and I have not heard from the

abstract. Will let you know as soon as I hear, but I expect there will be a lawsuit. You might start any time you get ready." Again, on February 25, appellant said in a letter to appellee: "I am sending you abstract by express, prepaid, with objections thereon. As it is getting late you might call the trade off, if you care to."

The foregoing statement is a general outline of the uncontroverted facts. The evidence bearing upon the different assignments of error will be considered more in detail in connection with the questions to which it is applicable.

After answering the bill appellant filed a cross-bill for the purpose of compelling the return to him of the pedigrees and other papers pertaining to the horses, which he had delivered to appellee. The cause was referred to a special master, who took the evidence and reported to the court, finding for appellant as to the title to the farm and against him upon the question of fraud and misrepresentation. The master recommended a decree dismissing the bill for want of equity. Both parties excepted to the master's findings, and upon a hearing before the court appellee's exceptions to the master's report were sustained and a decree rendered in accordance with the prayer of the original bill and dismissing the cross-bill.

Appellant's first and most serious contention is, that appellee was not able to convey a good merchantable title to the land. In determining this question it is immaterial whether the title be considered as of the date when the contract was made, the time the bill was filed or when the decree was rendered, since the state of the title was the same throughout the whole time covered by the negotiations and dealings.

While appellee furnished an amended abstract and submitted other evidences of his title at different times in his effort to satisfy the appellant, he did not, at any time after the contract was made, buy in any outstanding claim or title or otherwise attempt to acquire any other additional title.

It will be noted by reference to the contract that appellee's obligation in respect to the character of title to be conveyed is only such as is required by the clause in the contract by which he agrees to convey by "warranty deed." These words in a contract for the sale of real estate are construed as a covenant to convey a merchantable title. (*Brown v. Cannon*, 5 Gilm. 174; *Morgan v. Smith*, 11 Ill. 194; *Gradle v. Warner*, 140 id. 123.) The agreement did not require an abstract showing a perfect title of record. Appellant, apparently, loses sight of the distinction between a contract to furnish a perfect title of record or to furnish an abstract showing a perfect title, and a general agreement to convey a good merchantable title. Where the language of the contract requires the vendor to furnish the vendee with a perfect record title and an abstract showing the same, the purchaser will not be required to accept a title dependent upon adverse possession, since a good title of record is of a higher character and more desirable than one dependent upon extrinsic circumstances to be established by parol evidence. (Waterman on Specific Performance, 553; *Morgan v. Smith*, *supra*; *Attebery v. Blair*, 244 Ill. 363.) A contract like the one here involved, which merely obligates the vendor to convey a merchantable title, is fulfilled when the grantor conveys a perfect title, however acquired. Cases cited by appellant like *Smith v. Hunter*, 241 Ill. 514, and other cases in line with it, where the contract required an abstract showing a good merchantable title, are not applicable to the case before us and are clearly distinguishable therefrom. The question here is not the sufficiency of the abstract, but, did appellee prove by the abstract and other competent evidence that he was able to convey a merchantable title?

The most serious objection urged by appellant to appellee's title arises out of the following facts: Appellee's father, Jacob Bear, died testate thirty-one years before the trial of this case, owning one hundred acres of the land in

question. He left a widow and nine children. The widow, Mary Bear, has been dead fourteen years. The appellee acquired title by deeds from all of his brothers and sisters except Franklin P. Bear, who died December 17, 1878, leaving one child, a boy, who is known in this record as Arthur F. Bear, Harvey F. Bear and Franklin P. Bear, and the widow, Mary J., who afterwards married a man by the name of Maddon. The petition for letters of administration on the estate of Franklin P. Bear states that the deceased left one child, whose name is given as Arthur F. Bear. The mother of this child filed a petition asking that Solomon Mesnard be appointed guardian for Harvey F. Bear, a minor of the age of three years, on the 23d day of October, 1881, and letters of guardianship were accordingly issued to Mesnard of Harvey F. Bear on the 17th day of December, 1881. Afterwards, in 1884, Mesnard, as guardian, filed a petition in the county court of Effingham county, representing that Franklin P. Bear was a minor residing in Effingham county, and that he was appointed guardian of said Franklin P. Bear on the 17th day of December, 1881; that said Franklin P. Bear was an heir of Jacob Bear, his grandfather, and the owner of the undivided one-ninth interest (subject to the dower of Mary J. Bear) of a part of the lands involved in this controversy. The record shows that proceedings were had resulting in a decree for the sale of the ward's interest in said lands, and that the same were sold and the sale was duly approved on the 18th of March, 1884. Appellee claims title to a one-ninth interest under this guardian's sale.

The objection raised to the title is based on the discrepancy in the names by which the son of Franklin P. Bear was known at different times. This confusion as to the name of this boy is clearly explained by the evidence. It appears that the name first given to this child, and the one under which he was christened, was Arthur Franklin. The child was born October 23, 1878. His father died Decem-



ber following. After his father's death his mother changed his name to Franklin Pierce, which was the name his father had. The evidence shows that in 1887 Henry B. Kepley was appointed guardian of Franklin P. Bear at the request of his mother, Mary J. Maddon. All of the evidence in which any reference is made to this boy shows that he was the only child of Franklin P. Bear and that he was born on October 23, 1878. The testimony leaves no doubt that Arthur F. Bear and Franklin P. Bear (sometimes also called Harvey F. Bear) are one and the same person. The proof shows that the summons was served upon the owner of this land in the proceeding to sell by the guardian. The decree for the sale of this real estate was against the owner, and if he was sued by the wrong name but process was served upon him and he failed to take advantage of the mistake by plea in abatement, he would be bound by the decree,—and this rule applies as well to infants as to adult defendants. (*Pond v. Ennis*, 69 Ill. 341.) The guardian sale divested this ward's interest, and the objection to the title based on the discrepancy as to his name cannot be sustained. The remainder of the land was formerly owned by Thomas Goodnight, who died over forty years ago, and the title to that portion of the farm passed from his heirs to appellee. All of the other objections to the title are of a technical character and go rather to the form of the conveyances than to the title itself. The abstract, on its face, shows title in appellee to all of the premises, but there are some slight imperfections in some of the deeds in the chain of the title, such as the want of a seal to a deed; the absence of a certificate of magistracy where the acknowledgments were taken by a justice of the peace in a foreign county or State; the failure to produce the original patents; and the omission in some of the deeds of a clause waiving the homestead without any proof that the grantor had a homestead, and other like objections. Most of these objections relate to deeds that are from twenty to thirty years old, and all

of them were executed more than seven years before the contract was entered into. In addition to the conveyances which covered the whole title and all interest in the land, appellee introduced the record of a proceeding to quiet his title, which was had in 1898, to which all persons who had any claim to any portion of the land were made parties, which resulted in a decree quieting the fee simple title in appellee. Appellee also proved actual adverse possession of the entire premises for more than twenty years, together with proof that he had paid all taxes assessed against the land during that period. This evidence was amply sufficient to justify a finding that appellee had a merchantable title to the land.

Appellant makes the further contention that he was induced to sign the contract by fraud and misrepresentation as to value of the land. The evidence on this point is, that Craig told appellant that the land was worth \$60 per acre and that he could sell it for \$65 an acre in two weeks. The testimony is conflicting as to the value of the land. The estimates of the witnesses range all the way from \$30 per acre to \$70. The special master found the cash value to be \$50 per acre, and this finding is well supported by the testimony. While the weight of the evidence tends to show that Craig's estimate of the value was somewhat above the average, yet there are other witnesses who were well qualified to express opinions on the subject who fixed the value as high as \$60 per acre, and one witness testified that \$70 per acre would not be too high a valuation in a trade. Conceding the facts to be as appellant contends, and that Craig told him the farm was worth \$60 per acre when, in fact, it was worth only \$50, this fails to establish such fraud and misrepresentation as to defeat appellee's right to specific performance. The rule upon this subject is, that unless the inadequacy of price is such as shocks the conscience and amounts, in itself, to conclusive and decisive evidence of fraud in the transaction, it is not a sufficient

ground for refusing a specific performance. (*Zempel v. Hughes*, 235 Ill. 424.) In the case above cited this court had occasion to review numerous authorities upon this subject, and the conclusion there reached was that a party had a right to praise his property, and that the mere expression of opinion as to its value will not ordinarily be held to be fraud or misrepresentation. Appellant has not sustained his charge of fraud under the rule established by the authorities.

Appellant contends that the decree ought to be reversed because two of the horses that he agreed to deliver to appellee had died before the rendition of the decree and the decree required him to deliver the entire lot of horses. The two horses that died were valued in the trade at \$500 each. The decree requires appellant to specifically perform the contract. The mere circumstance that he is not able to deliver the identical animals that were sold is no reason why he should not be required to specifically perform the contract in so far as it can be performed and compensate the appellee in damages for that part of the contract that is impossible of performance. While the general rule is that upon the breach of a contract for the sale and purchase of real estate the person injured thereby has the choice of remedies either to sue for specific performance or damages, and cannot, in general, obtain both in relation to the same transaction, yet the rule is also recognized that a party may have specific performance generally, and damages for acts which do not admit of a decree for specific performance. (Waterman on Specific Performance, sec. 5, and authorities cited.) An illustration of this rule is given by Waterman, as follows: Where, in a contract to take a lease for a certain term, the lessee agreed to tear down a house on the premises and erect a new one, it was held that the lessor might obtain specific performance as to the lease and damages for not building the house, the court not having the power to decree specific performance as to the latter. Nu-

merous other illustrations are given by this author in a foot note to section 5. The decree in this case requires appellant to perform his contract, and in default it orders a sale of the premises for the purpose of paying appellee the consideration for the farm. Such a decree is authorized by *Corbus v. Teed*, 69 Ill. 205, and *Attebery v. Blair*, *supra*.

Appellant finally contends that this suit was prematurely brought. This contention has no foundation in the facts. Appellant had clearly indicated an intention on his part not to carry out the contract before the suit was brought, and in one of his letters to appellee he told him that he might commence his suit as soon as he was ready, or words to that effect. After the appellant had repudiated the contract and notified appellee that he did not intend to carry it out, appellee was not required to wait until the day possession was to be delivered before bringing his suit.

While we are of the opinion from what has been said that the appellee is entitled to have the contract specifically enforced as against the appellant, the relief granted to the appellee by the decree here under review is such that it must be reversed. The decree entered by the trial court requires "the appellant to turn over and deliver to the appellee the aforesaid described horses and that he pay to said appellee the sum of \$800 in cash, together with five per cent interest thereon from the first day of March, A. D. 1909, and that he execute and deliver to the appellee his promissory note for the sum of \$8000, dated March 1, A. D. 1909, due five years after date and drawing five per cent interest per annum, due and payable annually, and that to secure the payment of said note he execute and deliver to the appellee a good and sufficient mortgage deed of conveyance on said described lands." The decree then provides the master shall tender to the appellant a deed to said premises, and "in case the appellant shall fail or refuse to pay said \$800 in cash, with interest thereon, and shall fail and refuse to turn over and deliver to said appellee each and

every of said horses," and otherwise to comply with said decree, the master "shall proceed to sell said described lands, or so much thereof as shall be sufficient to realize the said sum of \$13,200, with interest thereon at the rate of five (5) per cent from the first day of March, A. D. 1909," and that the master, out of the moneys received from said sale, shall retain his fees, disbursements and commissions of said sale and pay the costs of suit, "and out of the remainder of said money he pay to the appellee in this suit the sum of \$13,200, with interest thereon at the rate of five (5) per cent from the first day of March, A. D. 1909, to the date of the sale," and that if said premises shall not sell for enough to satisfy said decree he report the same to the court and that a deficiency decree be entered against the appellant for the amount remaining unsatisfied.

The evidence showed that two of the horses had died prior to the entering of the decree. The appellant could not, therefore, comply with the decree entered against him, and the court might as properly have entered a decree requiring the appellant to pay the entire agreed price of said horses (\$4400) in lieu of said horses, with interest thereon at five per cent from March 1, 1909, as to have entered the decree that was entered, as that was the effect of the decree. The evidence showed that the value of the two horses which had died was \$1000. The decree should have provided the appellant should deliver the three horses which were alive, to the appellee and pay him \$1000 in cash in lieu of those that were dead, instead of requiring him to deliver to the appellee the two horses which were dead, and to that extent the decree of the circuit court should be modified.

The decree also required the appellant to pay interest on deferred payments due from the appellant to the appellee at five per cent from March 1, 1909, and until the decree should be satisfied, but failed to charge the appellee with the amount he received, or could have reasonably re-

ceived, from the use of said land during the time the appellant is decreed to pay interest to the appellee. It would be inequitable to require the appellant to pay interest to the appellee on the purchase money from March 1, 1909, and at the same time permit the appellee to enjoy the use and occupancy of the land which the purchase money represents, and the decree was also erroneous in that particular. *Marx v. Oliver*, 246 Ill. 316.

It is said the appellant did not prove that the appellee had remained in possession of the land, or that he received an income therefrom, after March 1, 1909. In his bill the appellee offered specifically to perform the agreement, "and to let him [the appellant] into the possession of the rents and profits thereof according to the tenor and effect of said agreement." The agreement provided the possession of the lands should be delivered to the appellant on March 1, 1909. Clearly, if the appellant is to pay interest from that date he should receive rent from that date, and if the proofs were defective on the question of rents the court should not have entered a decree for interest without being advised, from the proofs, upon the question of rents. Upon remandment the cause should be re-referred to the master to state an account of the rents and profits received from the land since March 1, 1909, and appellee should be charged with what he received or could reasonably have received from the land, and credited with what he has paid out for taxes and improvements from March 1, 1909, until the date of the statement of the account, unless it appears from the evidence that on March 1, 1909, the appellee offered to surrender the possession of said farm to the appellant and that the appellee after that date did not continue in the possession and control of said farm.

The decree of the circuit court will be reversed and the cause will be remanded for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

PORTER E. DANIELS *et al.* Appellants, *vs.* MATTIE G. SMITH  
*et al.* Appellees.

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*when appeal will lie from ejectment judgment as to one of lots involved.* Where an ejectment suit is for the possession of two separate and distinct lots and the questions of title are entirely independent of each other, an appeal will lie from a judgment against the plaintiffs as to one of the lots.

2. EJECTMENT—*vendee's performance of contract of purchase is a defense to ejectment.* In ejectment, where the plaintiff relies upon and proves a legal title, proof that the defendant has entered into possession under a contract of purchase and that he has performed his part of the contract presents a complete defense.

3. SAME—*proof of existence of contract is essential to defense based upon its performance.* Proof of the existence of the contract of purchase is essential to a defense based upon possession thereunder and performance of its terms, and proof which merely raises an inference of the existence of a contract, the terms of which are entirely unknown, is not sufficient to defeat a recovery by the plaintiff upon the strength of his proven legal title.

4. SAME—*when plaintiff is not required to show breach of contract of purchase.* In ejectment, where the plaintiff proves a clear legal title and the defendants offer proof which, at most, merely raises an inference that there was some sort of a contract under which possession was taken, the plaintiff is not required to prove that there was such a contract and then show its terms and a breach thereof. (*Rowland v. Fischer*, 30 Ill. 224, explained.)

5. SAME—*when proof of payment of taxes is not admissible.* In ejectment, where the plaintiff has proved legal title, proof that the person under whom the defendants claim paid the taxes on the land from a certain year until his death is not admissible, where there is no color of title, no claim under any limitation law, or any evidence of a contract under which he was to pay the taxes.

6. SAME—*adjudging all the costs against one party is not apportioning them.* The power of the court to apportion the costs where the plaintiff in ejectment recovers only a part of the land sued for does not justify adjudging all the costs against the plaintiff in such a case, as adjudging all the costs against one party is not apportioning them.

APPEAL from the Circuit Court of Wayne county; the  
Hon. J. R. CREIGHTON, Judge, presiding.

CREIGHTON & THOMAS, and KAGY & VANDERVORT, for appellants.

BOGGS, BOGGS & HEIDINGER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellants brought suit in ejectment in the circuit court of Wayne county against the appellees for the possession of lots 6 and 10 in the village of Orchardville, claiming title in fee. Mattie G. Smith, one of the appellees, who was an adult, filed a plea of not guilty. Bertha Smith and Luca Smith, the other appellees, being minors, a guardian *ad litem* was appointed for them, and he filed an answer in a form adapted to a suit in equity, praying strict proof of the matters alleged, and this was treated as a plea of not guilty. A trial resulted in a verdict of guilty as to lot 10 and not guilty as to lot 6. The appellants filed their motion for a new trial as to lot 6, which was overruled and judgment was entered on the verdict and all costs of the suit were adjudged against the appellants. An appeal was taken to this court, and the errors assigned relate to lot 6 and the judgment for costs.

The lots being separate and distinct and the questions of title entirely independent of each other, an appeal would lie from the judgment against the plaintiffs as to one of the lots. (*Village of Lee v. Harris*, 206 Ill. 428.) An affidavit that George E. Daniels was the common source of title was filed and not controverted, and plaintiffs proved that he died intestate and they were his heirs-at-law. The defendants were the widow and heirs-at-law of Dr. R. Button Smith, and it was proved that about 1900 or 1901 Dr. Smith took possession of the two lots; that an office building was erected on lot 10 and occupied for an office by the doctor until his death; that when the doctor took possession of lot 6, which is in controversy, there was a small



house of three rooms on the lot; that two rooms were added to the building, and there was some work done on the porch and a partition was moved, and that he paid for the work of the carpenters. George E. Daniels lived in Iuka, in Marion county, and owned lots and property in Orchardville. Jord Harrison, his son-in-law, was his partner, and they had a general store in Orchardville under the name of George E. Daniels & Co., which Harrison managed, and he also acted as general agent for the real estate and collected rentals. There was a barn on lot 6 which was not finished when Smith took possession, and Harrison had the barn finished and paid for it. There was no evidence under what arrangement Dr. Smith entered upon the lots. George E. Daniels died on May 25, 1905, and Jord Harrison, his partner and agent, died soon afterward. Dr. Smith died in 1909. A carpenter who helped put up the office and did the work on the porch and partition at the house, testified that about 1900 or 1901 John L. Scott, who was a clerk in the store of George E. Daniels & Co. and also a notary public, wrote some kind of a paper with relation to lot 6 which the witness said was a bond for a deed, but he did not remember the conditions; that Dr. Smith was present when the paper was written but Daniels was not, and it was taken away. He did not know whether it was ever signed or not, and Scott, who wrote the paper, had been dead about eight years at the time of the trial. The witness said that Dr. Smith took possession after that paper was written.

This was the only evidence tending in any degree to prove that there was a contract of purchase under which Smith or his heirs would have been entitled to possession provided its conditions were performed. It was entirely lacking in any tendency to prove the essential elements of a contract of purchase as to the amount, time of payment or any other conditions and did not amount to proof that there ever was a contract. It is argued that circumstances

were proved sufficient to raise an inference that there was some sort of contract, and that the burden of proof was on the plaintiffs to show a violation of some condition of the supposed contract. It is true that where a vendor seeks to recover in ejectment on the ground that the vendee has not performed his part of the contract for the purchase of the land in controversy, the burden of proof is on the plaintiff to show the default. That was the case in *Rowland v. Fischer*, 30 Ill. 224, where the plaintiff, to sustain the issues on his part, offered in evidence a bond for a deed and proof that the defendant was in possession under the contract or bond. That was all the evidence, and it was not proved that the notes given for the purchase money were unpaid. That rule has not been applied except in a case of that kind, but it has always been held that where the plaintiff relies upon and proves a legal title, and the defendant has entered into possession under a contract of purchase and has performed his part of the contract, proof of such facts will be a complete defense to an action of ejectment. (*Stow v. Russell*, 36 Ill. 18; *Turpin v. Baltimore, Ohio and Chicago Railroad Co.* 105 id. 11; *Chicago and Eastern Illinois Railroad Co. v. Hay*, 119 id. 493; *Sands v. Kagey*, 150 id. 109; *Harrell v. Enterprise Savings Bank*, 183 id. 538; *Hutchinson v. Coonley*, 209 id. 437; *Waggoner v. Wabash Railroad Co.* 185 id. 154.) While the defendants might successfully have defended by showing possession under a contract and the performance of its conditions, it is plain that they could not do so where the most they were able to do was to raise an inference that there might have been a contract, the terms of which were entirely unknown. Dr. Smith kept a bank account at Xenia, and a number of checks drawn by him on that bank in 1901 and 1902 in favor of George E. Daniels & Co. were offered in evidence, but it was proved that it was his habit to draw checks on the Xenia bank which Daniels & Co. cashed for him. So far as appears the checks all represented transactions of

that kind. It is argued that some of them might have been drawn as payments on the lot, but there is no evidence tending to prove that fact, and if he paid for the lot it is very strange that he did not obtain a deed during the several years afterward when George E. Daniels was alive or make any attempt to get a deed during the three or four years after his death. There was no evidence that any check was given for store account, for rent or on the purchase of the property. There was an entire failure of the defendants to prove any legal title or lawful right of possession.

The court admitted evidence of the payment of taxes on the lot by Dr. Smith from 1900 until his death, and as there was no color of title and no claim under any limitation law, nor evidence of any contract under which he was to pay taxes, the evidence was incompetent.

The first instruction given at the request of the defendants is as follows:

"The plaintiffs in this suit cannot recover unless the proof shows that they were entitled to have the possession of the lots delivered up to them at the beginning of this suit. The defendants are not necessarily required to show any title to the lots. The law requires the plaintiffs to show that they have the right to immediate possession of the lots, and if they have failed to so prove, your verdict should be that the defendants are not guilty."

The plaintiffs had shown legal title in themselves, and it was error for the court to instruct the jury that the defendants were not required to show any title, and to tell the jury that if the plaintiffs had failed to prove their right to immediate possession the verdict should be not guilty. By the fourth instruction the court advised the jury that a contract may be proved by proof of facts and circumstances from which a jury, as reasonable men, will infer or conclude that a contract was made, and if the jury be-

lieved, from all the facts and circumstances, that Dr. Smith occupied either of the lots under a contract of purchase on some terms or conditions and had made improvements thereon, plaintiffs could not recover unless they had shown, by a preponderance of the evidence, that Dr. Smith or the defendants were required, by the terms of the contract, to do something which he or they had failed to do and for that reason the plaintiffs were entitled to have and re-take the lots, and unless the plaintiffs had proved such a failure by a preponderance of the evidence the verdict should be not guilty. Other instructions were of the same character, and required the plaintiffs to prove the terms and conditions of a contract the existence of which they disputed, and then to prove a default in the performance of such terms and conditions. There was no evidence of any contract, and it was error to require the plaintiffs, after showing a clear legal title, to show that there was a contract giving the defendants a right to possession, and also to show what its terms and conditions were. The instructions for the defendants, as a series, were erroneous.

It has been held that upon a verdict in ejectment where the plaintiff recovers only part of the land sued for, the court may apportion the costs of the suit between the parties. (*Foster v. Letz*, 86 Ill. 412.) In this case the court adjudged all the costs against the plaintiffs, which was not an apportionment. A reversal of the judgment as to lot 6 will necessarily reverse the judgment as to costs, and the final judgment of the court as to them will depend upon the result of another trial.

The judgment as to lot 6 is reversed and the cause is remanded.

*Reversed and remanded.*

WESLEY CRAIG, Appellee, *vs.* OTIS A. TROTTER *et al.*  
Appellants.

*Opinion filed December 21, 1911.*

1. **APPEALS AND ERRORS**—*when freehold is involved though the will does not expressly devise real estate.* A freehold is involved on appeal from an order of the circuit court admitting to probate a will rejected by the probate court but making no order as to the will admitted to probate by the probate court, even though the will admitted to probate by the circuit court merely devises the property of the testator without mentioning real estate, where real estate is devised by the other will and it may be fairly inferred from the record that the testator owned real estate at his death.

2. **WILLS**—*what is sufficient request by testator to attest will.* It is not necessary that the testator shall by his own words either acknowledge his signature or request the attestation of the witnesses, and if persons are brought to him by a third party with the statement, in his presence, that they have been brought for the purpose of witnessing his will, and he then executes the will, which is signed by them as witnesses in his presence, his assent may be inferred unless there is other evidence leading to a different conclusion.

3. **SAME**—*testimony showing that testator was physically unable to sign will is competent on probate.* On application for probate, testimony describing the condition of the testator's hands, the extent to which they were swollen and the position and flexibility or stiffness of his fingers is competent to contradict the testimony of the subscribing witnesses that the testator signed the will in their presence; but testimony of nurses and others that in their judgment he could not hold a pen and pencil, though they had not seen him try, is properly rejected. (*Stuke v. Glaser*, 223 Ill. 316, distinguished.)

4. **EVIDENCE**—*when examination tending to show that witness has made contradictory statements should be allowed.* Where a witness who has testified that the testator assented, by spoken words, to the witnessing of the will, is asked, on cross-examination, if he did not, in a conversation with a named person at a specified time and place, state that the testator never said or did anything to indicate his assent, it is error for the court to refuse to allow the witness to answer and to refuse to allow the person with whom the alleged conversation was had to be interrogated with reference thereto.

5. SAME—*rule as to proving signature by comparison with signature admitted to be genuine.* The genuineness of a signature cannot be proved by comparison with a signature or other writings admitted to be genuine where such signature or other writings are not a part of the record and are not in evidence in the case; but where such signature or other writings are already in evidence in the case, comparison may be made by the jury and by experts testifying to the jury.

APPEAL from the Circuit Court of Adams county; the Hon. ALBERT AKERS, Judge, presiding.

WILSON & WALL, CHARLES J. SCOFIELD, WALTER H. BENNETT, and GOVERT & LANCASTER, for appellants.

W. H. COON, WILLIAM SCHLAGENHAUF, HUBBARD, SCHMIEDESKAMP & GROVES, and O'HARA, O'HARA, WOOD & WALKER, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

This is an appeal from a judgment of the circuit court admitting a will to probate. John W. Craig executed a will on March 5, 1910, whereby he devised to his brother Wesley certain real estate which he valued at \$6000, and gave to another brother and his two sisters legacies of \$6000 each. He gave twenty legacies of various amounts from \$500 to \$2000, and directed that all the residue of his property should be equally divided among his said brothers and sisters. On March 30, 1910, he executed a codicil to this will, whereby he reduced the amount of one of the legacies and gave legacies to three other legatees. On April 21, 1910, the will in controversy here purports to have been executed by him, whereby all his property is given in equal parts to his said four brothers and sisters. He died on April 28, 1910. Both wills were deposited in the county court, and after a hearing the first will and codicil were admitted to probate and the later will rejected. Wesley Craig appealed to the circuit court from both or-

ders. A hearing was had in the circuit court, the will of April 21 was admitted to probate, and it was ordered that no order be entered as to the appeal from the order admitting the prior will and codicil to probate until the further order of the court. Four of the legatees under the first will have appealed to this court.

The appellee insists that this court has no jurisdiction of the appeal because no freehold is involved, there being no other basis for the jurisdiction. The legacies to the appellants are pecuniary, the will in controversy describes no specific real estate, and it is said that there is no evidence that John W. Craig died seized of any real estate. The will does purport to dispose of all the testator's real estate. The prior will, which was introduced in evidence, describes a certain tract of land which was devised to Wesley Craig, and it may be fairly inferred from the record that the testator owned real estate at his death. The effect of the order admitting the will to probate is to vest the freehold in the devisees.

The only evidence introduced by the proponent of the will was the testimony of the subscribing witnesses, and the appellants insist that it does not sufficiently appear from their testimony that they attested the will at the request of the testator. The witnesses went, at the invitation of Wesley, to the place where the will was executed, the testator's room in Blessing Hospital, in Quincy, where he was confined, as he had been for some weeks, critically ill with a disease of the valves of the heart, which soon after terminated fatally. They testified that when they came into the room Wesley told the testator that he had brought them to witness his will. One of them said that the testator said "all right," and the other that he assented with a slight motion of the head. The will was then read over to him. He said it was all right,—it was his will,—and signed it, and the witnesses then signed in his presence. It is not necessary that the testator shall in words of his own either

acknowledge his signature or request the attestation of the witnesses. It is a sufficient request if he makes known his desire that the witnesses shall sign as witnesses of his will. An invitation given or expression of a desire made in his presence by another on his behalf assented to by him is equivalent to his own invitation or expression. If persons are brought to him with the statement, made in his presence, that they have been brought for the special purpose of witnessing his will, and he then executes his will and it is signed by them as witnesses in his presence, it may fairly be inferred that everything done was at his request, unless the other evidence leads to a different conclusion. (*Allison v. Allison*, 46 Ill. 60; *Harp v. Parr*, 168 id. 459; *Masonic Orphans' Home v. Gracy*, 190 id. 95; *Gilbert v. Knox*, 52 N. Y. 129; *Inglesant v. Inglesant*, L. R. 3 P. & D. 172.) The question in the first three cases cited was in regard to the acknowledgment and not the request of the witnesses, but the principle is the same.

The appellants introduced testimony tending to show that the attesting witnesses were not in the testator's room at the hospital at the time they claim the will was executed, and that the testator's physical condition was such that he could not have signed his name to the paper as the witnesses testified he did, because his hands were so much swollen that he could not hold a pen or pencil. It is insisted by the appellee that this evidence of physical inability was not competent, and he cites in support of his position *Stuke v. Glaser*, 223 Ill. 316. That case, however, is not in point. The comatose condition of the testatrix in that case, if shown, would have affected her testamentary capacity, and it is held that testamentary capacity was not open to general inquiry in a proceeding for the probate of the will, but that those opposing the probate were limited, so far as that question was concerned, to the testimony of the subscribing witnesses. In this case, however, the claim was made that the testator had never executed the will, and testimony that



he was physically unable to make his signature was competent to contradict the testimony of the subscribing witnesses that he had personally signed his name. Evidence of nurses and others that in their judgment the testator could not hold a pen or pencil, though they had not seen him try, was properly rejected. They were permitted to describe the condition of his hands, the extent to which they were swollen and the position and flexibility or stiffness of the fingers, and from their testimony the court could draw a conclusion as to his ability to write, as accurately as the witnesses.

L. H. Menne, one of the subscribing witnesses to the will, testified that after the witnesses got into the testator's room, the appellee said to his brother, "I brought Mr. Menne and Bobbie here to witness your will," and that then John Craig said, "All right." On cross-examination he was asked if he had not said to W. H. Govert, in a conversation at a certain time and place, that John Craig at no time said anything with reference to Menne's witnessing the will to indicate that he consented or wanted him to do so, either by word, motion or gesture. The court refused to require the witness to answer the question, and, when W. H. Govert was called by the appellants, refused to permit him to answer the same question or to be interrogated about the conversation. Such a conversation would have tended to impeach Menne by showing that he had made a statement about a material question differing from his testimony in court, and the examination in regard to it should have been allowed.

The first will and the codicil, which were admitted to bear the genuine signatures of John W. Craig, were introduced in evidence by agreement, for the purpose of showing the appellants' interest. The appellants produced as witnesses certain experts in handwriting, and sought to show by them that they had made examinations of the respective signatures and that the signatures to the wills of

March 5 and of April 21 were not made by the same person, and to show also the reasons for coming to that conclusion. The court sustained the appellee's objection to this evidence, and his counsel now seek to sustain the ruling on the ground that the genuineness of a signature can not be proved or disproved by a comparison of handwritings. It is well settled that this is the rule where the genuine signatures are no part of the record and are not in evidence in the case. It is equally well settled that when other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury and by experts testifying to the jury. (*Stitzel v. Miller*, 250 Ill. 72; *Himrod v. Gilman*, 147 id. 293; *Rogers v. Tyley*, 144 id. 652; *Brobston v. Cahill*, 64 id. 356.) It was error to sustain the objection to this testimony.

The judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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J. R. HOLT, Appellant, vs. AERWINE WILLETT, Appellee.

*Opinion filed December 21, 1911.*

ELECTIONS—*resignation of incumbent before a contest proceeding is begun bars the proceeding.* The resignation of the incumbent of an office before a proceeding is begun to contest his election is a defense to the proceeding and justifies the dismissal of the petition on demurrer, notwithstanding the petition alleges that the purpose of such resignation was to forestall the contest and prevent the exposure of the fraud practiced at the election. (*Raferty v. McGowan*, 136 Ill. 620, followed.)

APPEAL from the County Court of Fayette county; the Hon. JOHN H. WEBB, Judge, presiding.

ALBERT & MATHENY, for appellant.

ARTHUR ROE, for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court :

Appellant, J. R. Holt, filed a petition in the county court of Fayette county against Aerwine Willett to contest the election of Willett to the office of school director of school district No. 60, in said county, to which a demurrer was interposed and sustained and the petition dismissed. The petitioner has perfected an appeal to this court, and the only question presented for our consideration is as to the sufficiency of the petition.

The petition alleges that a school election was lawfully held in said district on April 15, 1911, to elect one school director and that petitioner and Willett were opposing candidates; that there were 46 legal votes cast at such election, of which petitioner received 27 and Willett 19; that through the fraud and misconduct of the judges of the election Willett was declared elected and proclamation made thereof at the conclusion of the count of the ballots. The petition further alleges that after Willett and Cleary, another member of the board of directors, learned that the petitioner was intending to contest said election and had consulted and employed an attorney for that purpose, said Willett and Cleary, in order to forestall such contest and deprive petitioner of said office and to prevent the fraudulent practices from being exposed, resigned their said offices as directors of said district, which said resignations were accepted; that a special election had been called by the only remaining school director to fill the vacancy caused by the resignation of said Cleary, and that said special election had been held and Fred Klinge was elected at such special election to fill the vacancy caused by the resignation of Cleary; that no election has been called or held in said district to elect a successor to fill the vacancy caused by the resignation of Willett. The petition prays for a recount of the ballots and that petitioner may be declared duly elected to the office of school director.

The legal question presented is whether the resignation of a contestee before the proceeding to contest the election is instituted is a good defense to the proceeding to contest the election. The case of *Rafferty v. McGowan*, 136 Ill. 620, which was a proceeding to contest the office of town assessor, is a controlling authority upon this question. Among other defenses set up by the answer of the respondent was, that respondent had resigned and that his resignation had been accepted and a successor appointed before the proceeding to contest the election was commenced. The question presented in that case was thus stated by the court, on page 625: "It will be observed that this proceeding to contest the election was not instituted until after appellee had resigned the office and his successor had been appointed and qualified; and the question raised by the answer is, whether a proceeding of this character may be maintained against the person who does not hold or claim the office which the petitioner seeks by his position to contest." In disposing of that question this court further said: "From the sections of the statute *supra* it would seem that the person whose office is to be contested is the person to be brought into court as a defendant to the proceeding. If this is correct,—and the statute so declares,—then the defense interposed by appellee was a valid defense to the petition. Appellee did not hold the office nor did he set up any claim whatever to it. So far as he was concerned he was an utter stranger to the office of assessor. When a person who may be declared elected to a town office may die, resign or refuse to accept the office and some other person is appointed or elected before a contest is instituted, the person first declared elected cannot be 'the person whose office is contested,' within the meaning of the statute. Appellee held this office but three days, when he resigned. He received no fees or emoluments while he held the office. Why should he be dragged into court and compelled to litigate a matter in which he has no interest and to which he

sets up no claim? We are aware of no principle upon which he can be made a defendant and be compelled to litigate the title to the office after his resignation, the resignation having been accepted before the proceedings to contest were instituted." This authority would seem to be conclusive of the question presented in the case at bar.

The judgment of the county court of Fayette county is affirmed.

*Judgment affirmed.*

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FRANK HAYNES, Exr., Plaintiff in Error, vs. ELIZABETH McDONALD et al. Defendants in Error.

*Opinion filed December 21, 1911.*

1. WILLS—a legacy is not a charge against real estate unless made so by will. A legacy is not a charge against real estate unless made so by the will, and if the personal estate is insufficient to pay it the legacy must abate.

2. SAME—will must evidence an intention to charge real estate with payment of legacy. The intention of the testator to charge real estate with the payment of a legacy must be evidenced by the will itself, either by express words or necessary implication, and if there is no ambiguity in the language of the will, extrinsic circumstances cannot be considered to show an intention to charge a legacy upon real estate contrary to the intention appearing from the language used.

3. SAME—direction to pay legacy "in due course of administration" does not charge real estate. A direction that a legacy be paid "in due course of administration" refers to the time the legacy is to be paid and does not charge the payment thereof upon real estate.

4. SAME—when a legacy is not a charge upon real estate. A legacy to be paid "in due course of administration" is not a charge upon real estate where there is no express language to that effect in the will and no residuary clause, and where the testator left considerable personal estate, though not enough, after paying the debts of the estate, to pay the legacy in full; and in such case there is no authority for selling real estate, testate or intestate, to pay the legacy.

WRIT OF ERROR to the Circuit Court of McDonough county; the Hon. ROBERT J. GRIER, Judge, presiding.

ELTING & HAINLINE, and SCOFIELD & CALIFF, for plaintiff in error.

FLACK & LAWYER, (GEORGE D. TUNNICLIFF, guardian *ad litem*,) for defendants in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

This was a bill filed by plaintiff in error, as executor of the last will and testament of Josiah McDonald, deceased, against the widow, heirs and devisees of the testator, for an order to sell real estate of said testator to pay a balance due on a legacy to the testator's daughter, the personal property being insufficient to pay the liabilities of the estate and said legacy in full. The only question involved is whether the legacy of \$20,000 to the testator's only daughter was a charge upon the real estate.

Josiah McDonald at the time of his death was the owner of a considerable amount of real estate. By the first paragraph of his will he directed that all his just debts and funeral expenses be paid. By the second paragraph he gave to his widow, in lieu of dower and award, the homestead during her life and the household goods and kitchen furniture as her absolute property forever. By the third, fourth, fifth and sixth paragraphs he devised all his real estate, except as hereafter stated, to two sons and two grandsons and their children. Paragraph 7 made the support of the insane father of one of the grandsons, by said grandson, a charge against the land devised to him. Paragraph 8 required the same grandson to pay certain sums of money to certain persons in said paragraph named. Paragraph 9 required another grandson, a devisee, to pay each of his four sisters \$1000 and made the same a charge upon the land devised. Paragraph 10 is as follows: "I give, devise and

bequeath to my daughter, Mary M. Haynes, twenty thousand dollars (\$20,000), to be paid to her in due course of administration of my estate." The eleventh paragraph provided for the disposition of the property if any of the sons or grandsons to whom land was devised for their lives died without a child or children or descendants of such. The twelfth paragraph named the testator's son Harvey R. McDonald, and his son-in-law, Frank Haynes, executors of his will, and authorized them "to do and perform any and all acts necessary to the carrying out the provisions of this will and to the closing up of my estate." In case either of said parties died or refused to act the survivor was given full power to administer the estate and perform all acts that both could perform if they were both acting. The son refused and neglected to qualify as executor. Frank Haynes qualified and was duly appointed as sole executor and letter's testamentary issued to him, and in that capacity he filed the bill in this case.

The bill alleged that the claims allowed against said estate amount to \$944.88; claims yet to be allowed, \$143.65; costs due and to accrue, including the executor's compensation, \$2000; taxes, \$124,—making a total liability, not including the legacy to Mary M. Haynes, of \$3212.53; that the total personal assets received by the executor amounted to \$20,093.37, which leaves a deficiency of the personal estate to pay the debts, costs of administration and the legacy to Mary M. Haynes of \$3119.16. The bill further alleges that at the death of the said Josiah McDonald he was the owner of three-fifths of thirty-three acres off the east side of the east half of the north-east quarter of section 2, township 5, north, range 2, west of the fourth principal meridian, in McDonough county, Illinois, and the south half of the east half of the south-west quarter of the south-west quarter of section 16, township 4, north, range 1, east of the fourth principal meridian, in Fulton county, Illinois, containing ten acres, and that said lands were not disposed

of by the said Josiah McDonald by his will; that the fair market value of the intestate land is \$3000 and the fair market value of the testate land is \$100,000.

It appears from the allegations of the bill that the testator and his wife owned the east half of the north-east quarter of section 2 as tenants in common, the testator owning three-fifths and his wife two-fifths. By his will the testator devised forty-seven acres off the west side of the eighty to one of his sons for life, with remainder to his children. This was substantially three-fifths of the eighty, and it is claimed the widow having accepted the provisions of the will, she thereby elected to take the thirty-three acres off the east side of the eighty as her sole property and the forty-seven acres went to the devisee disencumbered of any interest in the widow. It is this controversy over the title to the thirty-three acres that is claimed to involve a freehold and give this court jurisdiction. This question was raised as one of the special causes of a demurrer filed by defendants in error. Other special grounds of demurrer were, that the plaintiff in error had no such interest in the premises as entitled him to maintain his bill, and that the legacy to Mary M. Haynes was not by the will made a charge against the real estate, either testate or intestate. The bill prays for a decree authorizing and directing the executor to sell the intestate lands and so much of the testate real estate as may be necessary to pay the liabilities of the estate, including the payment of the \$20,000 legacy, in full, to Mary M. Haynes. The demurrers were sustained and a decree entered dismissing the bill. The executor has brought the case to this court for review by writ of error.

The plaintiff in error contends that the tenth clause of the will, directing the payment of the legacy in due course of administration of the estate, requires the legacy to be treated as if it were a claim against the estate, and made the real estate liable for its payment if the personal assets were insufficient; also, that the twelfth clause of the will,



authorizing the persons named as executors to do everything necessary to carry out the provisions of the will and close up the estate, shows an intention to make the real estate liable for the legacy. It is also contended by plaintiff in error that the intestate real estate is liable, if the other real estate is not, for the payment of the legacy. While there is no residuary clause in the will, plaintiff in error argues that the omission to dispose of all the testator's real estate by his will requires the intestate lands to be treated the same as if there had been a residuary clause in the will giving whatever remained of the testator's estate to his heirs, and that under such a residuary clause the legacy would be a charge upon the residuary estate, real and personal.

Legacies are not charges against the real estate of the testator unless they are made so by the will. They are charges against the personal estate, and if the personal estate is insufficient to pay the legacies they must abate, unless the will charges the real estate with their payment. The intention of the testator to charge his real estate with the payment of legacies may be evidenced by express words or it may be implied from a consideration of the whole will. (*Heslop v. Gatton*, 71 Ill. 528; *Reid v. Corrigan*, 143 id. 402; *Simonsen v. Hutchinson*, 231 id. 508; *Williams v. Williams*, 189 id. 500.) The legacy to Mary M. Haynes is not charged against the real estate in express words, and we find no language in the will from which any such intention of the testator can reasonably be implied. The direction that the legacy be paid "in due course of administration of my estate" refers to the time of its payment and does not make it a charge against the real estate. There is no such ambiguity in the language of the will as would justify the consideration of extrinsic circumstances, as contended for by the plaintiff in error, in determining the intention of the testator.

In *Heslop v. Gatton*, *supra*, the testatrix gave each of her two daughters one dollar, a sister \$1000 for life, and a grand-daughter all the personal property, except a horse, buggy and harness. The testatrix owned real estate worth \$1000, and at the time of the execution of the will she had about \$300 in money. She made no devise of the real estate to anyone. It was sought to subject the real estate to the payment of a remainder due on the legacy to the sister, but it was held the legacy was not expressly charged by the will against the real estate and that no such intention could be fairly and satisfactorily inferred from the language used.

In *Wentworth v. Read*, 166 Ill. 139, the testator gave his wife all his estate, real and personal, during her life. He then gave specific legacies to other persons, amounting, in the aggregate, to \$12,000. There was no residuary clause in the will and no devise was made of the fee in the testator's real estate. He owned but little personal property, and it was sought to construe the will making the legacies a charge against the real estate and authorizing its sale for their satisfaction. The court said: "It is not claimed that the will, upon its face, either expressly or impliedly provides for such lien or charge, but it is insisted that the will should be read in the light of extrinsic facts and circumstances which existed when it was made and when it took effect and which were well known to the testator, and that when so read and considered the implication arises that the testator intended to charge these legacies upon his real estate. It is, however, well settled that the intention of the testator must be determined by the will itself, and not from evidence *aliunde*. There is no latent ambiguity in the will requiring parol evidence to explain, and where the intention to make the legacies a charge upon the real estate is not expressed in the will or cannot be implied from the language used, we know of no rule of law which would authorize us to go outside of the will to look for proof of such intention."

Numerous cases hold that where there is a residuary clause in the will devising the remainder of the testator's estate, unless a contrary intention appears this will be construed to mean the residuum of the estate, real and personal, after the payment of legacies. The cases above mentioned, and others that might be cited, hold that where there is no latent ambiguity in the will, extrinsic circumstances are not admissible to show the intention of the testator to be different from that appearing from the language of the will.

Plaintiff in error cites some cases from other jurisdictions in which it has been held that where a testator had no personal property at the time of making his will, or where he so disposed of it that it could not be made available for the payment of legacies, it will be presumed he intended to charge the legacies upon his real estate. This rule, however, has not been adopted in this State. (*Wentworth v. Read, supra*; *Heslop v. Gatton, supra*.) But the rule where it has been adopted has not been applied in cases where, at the time of the execution of the will, the testator had personal property, although it was subsequently lost or disposed of. It appears from the bill in this case the testator left personal estate worth \$20,000.

It is conceded the testator was the owner in fee simple of the ten acres of land above described which were not devised by the will. We do not consider it necessary to determine the controversy as to the title to the thirty-three acres, which were also not disposed of by the will, for if both tracts were the undisputed property of the testator they were not chargeable by the will with the payment of the legacy, but would descend to the heirs of the testator, under the laws of descent, as intestate property.

The decree of the circuit court is affirmed.

*Decree affirmed.*

ALICE FRENCH *et al.* Appellants, *vs.* JENNIE E. CALKINS  
*et al.* Appellees.

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*when a freehold is involved in a proceeding to contest a will.* Where a bill to contest a will attacks the clause of the will devising the real estate of the testatrix to the trustees a freehold is involved, and an appeal lies to the Supreme Court from a decree dismissing the bill, on demurrer, for want of equity.

2. WILLS—*when subject matter of gift to trustees for charity is not uncertain.* A gift to charity of any moneys or securities remaining in the hands of the trustees after carrying out the terms of the trust is not invalid upon the ground of uncertainty as to whether there will be anything remaining in the hands of the trustees, where it appears from the will itself that the trustees cannot convert the dwelling house into cash until the happening of the event which terminates the trust. (*Wilce v. VanAnden*, 248 Ill. 358, and *Mills v. Newberry*, 112 id. 123, distinguished.)

3. SAME—*when gift to hospital is a bequest of personal property.* Where a will authorizes and directs the trustees to convert the estate into personalty and dispose of the same as therein directed, the final bequest being to a hospital, the gift to the hospital is a bequest of personal property.

4. SAME—*life taken as part of measure of time in rule against perpetuities need not be that of a person having an interest.* The life of some person in being, with twenty-one years added, is taken as the measure of time for the application of the rule against perpetuities, but it is not necessary that the life so considered shall be that of a person having an interest in the estate.

5. SAME—*when bequest to hospital is not within rule against perpetuities.* Where the death of an annuitant in being at the death of the testatrix is the utmost limit of time for the vesting in possession of a bequest to a hospital the bequest is not within the rule against perpetuities, even though an annuity is not an estate in property.

6. SAME—*bequests to charity are not ordinarily subject to rule against perpetuities.* The rule against perpetuities is established and enforced upon grounds of public policy, but as the public is vitally interested in the maintenance of public charities there are equally persuasive reasons of public policy for sustaining gifts to charity, and they are therefore not within the rule against perpe-

tuities,—at least unless there is some preceding estate which is void under that rule.

7. *SAME—rule against perpetuities applies to personal property as well as to real estate.* The rule against perpetuities applies to personal property as well as real estate and to legal as well as equitable estates.

8. *SAME—it is no objection to charitable bequest that trustees have a discretion in selecting.* A bequest to trustees for some hospital offering care and treatment for tubercular patients or to such corporation or society conducting such a hospital as the trustees may select is a gift to charity in which the recipients of its benefits are definite and certain, and the fact that the trustees are authorized to select the proper hospital to administer the charity does not render the bequest void, as a court of equity would not permit the trustees to bestow the fund upon a private hospital for profit, but only upon one which will administer it as a public charity.

9. *SAME—when gift to charity will not be allowed to fail.* A gift to charity will not be allowed to fail for uncertainty as to the persons who are to take or because the manner specified for managing the gift cannot be carried into exact execution.

10. *SAME—a gift for the support of churches is for a charitable use.* A bequest to the rector, wardens and vestry of a certain church is a good charitable bequest, and an added statement that the money be used and applied, in such manner as the rector, wardens and vestry deem proper, as a memorial to the family of the testatrix does not invalidate the bequest, since the fact that the bequest is given with an intention to obtain some benefit or from a personal motive does not destroy its character as a charity.

11. *SAME—when precatory words following a bequest are sufficient to create a trust.* Precatory words following a bequest to the rector, wardens and vestry of a certain church, expressing a wish that it shall be used in the purchase of real estate for the erection of permanent improvements in connection with the church property, to remain as a permanent memorial of affection for the church body and the membership thereof, are sufficient to create a trust and require that the bequest be devoted to that use, which is of a charitable nature.

12. *TRUSTS—trust to defray expenses of sickness of beneficiary is proper.* A provision in a trust for the benefit of a certain beneficiary, authorizing the trustees, in case of an emergency arising by reason of the serious or protracted illness of the beneficiary, to pay out of the net income, in addition to the regular monthly payments to such beneficiary, all or any part of the expenses neces-

sarily incurred for medical, surgical or hospital care of the said beneficiary, is not invalid for uncertainty.

13. SAME—*act of 1907, against directions for accumulation in deeds or wills, construed.* The purpose of the act of 1907, (Laws of 1907, p. 1,) restraining trusts and directions for accumulation in deeds or wills, was not to defeat the intention of a testator as to who shall be entitled to the property under a will but only to prevent indefinite accumulations of wealth, as it merely limits the period of accumulation, and the produce beyond that limit goes to the same person who would have been entitled to it if the accumulation had not been directed.

14. SAME—*effect of act of 1907, restraining directions for accumulations.* Even though there may be an expressed direction for accumulation in a deed or will, the trust is not void, as a whole, under the act of 1907, (Laws of 1907, p. 1,) but is only void as to the excess, provided the trust would have been good before said act took effect.

15. SAME—*when question whether trust is within act of 1907 cannot be decided.* Where there is no direction in a will for accumulation of the trust fund, which can only accumulate in the event the income exceeds the expenses, the courts cannot, upon such possibility alone, decide whether the trust provision is within the act of 1907, (Laws of 1907, p. 1,) restraining trusts and directions for accumulation.

APPEAL from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

MCCASKILL & MCCASKILL, (FRANK B. REYNOLDS, of counsel,) for appellants:

To constitute a valid trust by devise three things must concur: sufficient words to raise it, a definite subject of devise and a certain or ascertained object. *Mills v. Newberry*, 112 Ill. 123; *Hill on Trustees*, (4th Am. ed.) 110; *Dalrymple v. Leach*, 192 Ill. 51.

Where there is a devise to a first taker with limitation over to a charity, if it is uncertain what, if anything, the charity will take, there is no definite subject of devise and the trust is void. *Dalrymple v. Leach*, 192 Ill. 51; *Mills v. Newberry*, 112 id. 123; *Coulson v. Alpaugh*, 163 id. 298; *Henderson v. Blackburn*, 104 id. 227; *Chapman v.*

*Brown*, 6 Ves. 404; *Attorney General v. Hinxman*, 2 J. & W. 270; *Limbrey v. Gurr*, 6 Mad. 151; *Croup v. Playfoot*, 4 K. & J. 479; *Fowler v. Fowler*, 33 Beav. 616; *Attorney General v. Goulding*, 2 Bro. C. C. 428.

Where a will provides for the payment of annuities out of the income of a trust estate, and further provides that if the income is not sufficient the trustees shall pay the annuities out of the *corpus* of the estate, and there is a gift of whatever be remaining, after the payment of the annuities, to a charity, the charity will take nothing, as the subject matter of the gift to charity is uncertain. *Wilce v. VanAnden*, 248 Ill. 358; *Mills v. Newberry*, 112 id. 123; *Dalrymple v. Leach*, 192 id. 51.

A trust must have a definite and ascertained, or ascertainable, *cestui que trust* to sustain it unless the trust be for charity. Perry on Trusts, sec. 729, and cases cited; *Morice v. Bishop of Durham*, 9 Ves. Jr. 399.

A hospital, to be a public charity, must not be organized for private gain, and it must, in fact, be devoted entirely to the benefit of the public. If pecuniary profit to individuals be derived therefrom, though incidentally the public is benefited thereby, it loses its charitable character. *People v. Ravenswood Hospital*, 238 Ill. 137; *Sisters of St. Francis v. Board of Review*, 231 id. 317; *Board of Review v. Provident Hospital*, 233 id. 242; *University of Louisville v. Hammoch*, 127 Ky. 564; *Phillips v. Railroad Co.* 211 Mo. 419.

A charity is the same for purposes of taxation and for taking a bequest under a will. There is no different test applied in tax cases. *In re Estate of Graves*, 242 Ill. 23.

In order to sustain a gift as charitable it must certainly and definitely be devoted to charity by the terms of the will. If any discretion is vested in trustees whereby they may select an object which is not charitable, the gift will fail. *Crerar v. Williams*, 145 Ill. 625; *Attorney General v. Soule*, 28 Mich. 153; *Adye v. Smith*, 44 Conn. 60; *Pell*

v. *Mercer*, 14 R. I. 412; *Nichols v. Allen*, 130 Mass. 211; *In re Hinckley's Estate*, 58 Cal. 457; *Morice v. Bishop of Durham*, 9 Ves. Jr. 399; 10 id. 522.

A private gift, although charitable in character, does not fall within the contemplation of the statute of charitable uses. *Ommanney v. Butcher*, T. & R. 261; *Nash v. Morley*, 5 Beav. 177; *Old South Society v. Crocker*, 119 Mass. 1; *Kelly v. Nichols*, 18 R. I. 62; *Kent v. Dunham*, 142 Mass. 216; *Carne v. Long*, 2 DeGex, F. & J. 75.

A direction to accumulate property or a fund for a period longer than twenty-one years is void. *Hurd's Stat.* 1908, p. 516; *In re Edward*, 190 Pa. St. 177; *Schwartz's Appeal*, 119 id. 337; *Grimm's Appeal*, 109 id. 391; *McKee's Appeal*, 196 id. 277; 30 Cyc. 1521.

A trust to accumulate which may possibly exceed a life in being and twenty-one years beyond, and in case no life estate is taken, then twenty-one years at all events, is void. 22 Am. & Eng. Ency. of Law, 734; 30 Cyc. 1498; *Kimball v. Crocker*, 53 Me. 263.

Where no life estate is given in property or a fund, the period of suspending the gift of the property or fund can not, under the rule against perpetuities, exceed twenty-one years. *Johnson v. Preston*, 226 Ill. 447; *Tiffany on Real Prop.* sec. 154; *Marsden on Perpetuities*, 34; *Palmer v. Holford*, 4 Russ. Ch. 403; *Crooke v. DeVandec*, 9 Ves. 197; *Speakman v. Speakman*, 8 Hare, 180; *Kimball v. Crocker*, 53 Me. 263; *Andrews v. Lincoln*, 95 id. 541; 1 *Jarman on Wills*, (6th Am. ed.) 216; *Andrews v. Andrews*, 110 Ill. 223.

An annuity is not a life estate, hence the life of an annuitant is not considered in calculating the period of suspension. *DeHaven v. Sherman*, 131 Ill. 115; 22 Am. & Eng. Ency. of Law, 717, and cases cited.

A gift to trustees does not vest the estate in the trustees so as to prevent the operation of the rule against perpetuities. The beneficial gift to the *cestui que trust* must



vest within the period. The courts will not permit a perpetuity to be hidden behind a trust. *Bigelow v. Cady*, 171 Ill. 229; *Howe v. Hodge*, 152 id. 252.

To be charitable a gift must be free from any taint or suspicion of anything personal, private or selfish. The gift to the Coldwater church is a trust for a private purpose, viz., to perpetuate the family name of testatrix. *Vidal v. Girard*, 43 U. S. 123; *Price v. Maxwell*, 28 Pa. St. 23.

JESSE HOLDOM, UNDERWOOD & MANIERRE, and C. P. GARDNER, (THORNTON M. PRATT, of counsel,) for appellees:

The statute of 43 Elizabeth, (chap. 4,) commonly known as the Statute of Charitable Uses, is in force in this State. *Hoeffer v. Clogan*, 171 Ill. 462; *Heuser v. Harris*, 42 id. 425; *Andrews v. Andrews*, 110 id. 223; *Hunt v. Fowler*, 121 id. 269.

A gift in trust for a charity which is to take effect upon a contingency that may not happen within the perpetuity period is valid if there is no gift of the property in the meantime for the benefit of a private person. *Crerar v. Williams*, 145 Ill. 625.

Where a gift is made to charity a court of equity will regard the public as the object of the testator's bounty. The gift may therefore vest at once although the enjoyment of the benefit of the gift may be postponed. The vesting of the gift in right is sufficient to satisfy the rule against perpetuities. *Crerar v. Williams*, 145 Ill. 625.

The test of the vesting of a future interest is whether the estate created may turn into a permanent estate of possession immediately upon the termination of the preceding estate. *Lunt v. Lunt*, 108 Ill. 307.

If the general character of the institution for which a bequest is made is charitable, the gift will be sustained. *Kemmerer v. Kemmerer*, 233 Ill. 327; *Germain v. Baltes*,

113 id. 29; *Burbank v. Burbank*, 152 Mass. 254; *In re Trim's Estate*, 168 Pa. St. 395.

The discretion given the trustees to select a particular recipient of a charitable bequest does not vitiate it. *Estate of Dulles*, 218 Pa. 162.

As to what constitutes sufficient certainty of the subject matter of a trust for charity, see *Dye v. Beaver Creek Church*, 48 S. C. 444, and *Kemmerer v. Kemmerer*, 233 Ill. 327.

A clause in the will directing the executors and trustees to set apart a fund to raise an income out of which to pay expenses of the trust does not give the executors and trustees the power to fix the amount of that fund arbitrarily and does not render the subject matter of the bequest so indefinite as to be void. *Crerar v. Williams*, 145 Ill. 625.

The possible insufficiency of the funds bequeathed for the purposes intended does not defeat the bequest. *Kemmerer v. Kemmerer*, 233 Ill. 327.

A trustee may make temporary accumulations as a provision against future payments without violating the statute. *In re Spring*, 216 Pa. St. 529.

If a provision for accumulation is objectionable only because it is to continue for a period longer than that allowed by the statute, the provision is void only as to the excess. *In re Rogers' Estate*, 179 Pa. St. 602.

Without regard to the statute, a present gift in trust for charity, with directions to accumulate, is valid and operative, even though the period may exceed lives in being and twenty-one years thereafter. *Ingraham v. Ingraham*, 169 Ill. 432.

Where two modes of construction are possible, by one of which a legacy to charity would be made an illegal perpetuity and by the other of which such legacy would be valid, the latter mode of construction will be adopted. *Ingraham v. Ingraham*, 169 Ill. 432.

A bequest in trust for the erection and maintenance of a hospital "for the treatment of the sick and diseased" was held to be a charitable bequest. *Ingraham v. Ingraham*, 169 Ill. 432.

A bequest to a religious institution is *prima facie* a bequest for a charitable purpose. *Alden v. St. Peter's Parish*, 158 Ill. 631; *Fairbanks v. Lamson*, 99 Mass. 533.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellants, Alice French and H. C. Rogers, alleging that they were collateral relatives and heirs-at-law of Harriet M. Lanphere, deceased, filed their bill in the circuit court of Cook county, for themselves as well as all other heirs-at-law of the said Harriet M. Lanphere, against the appellees, Frank H. T. Potter and Charles E. Field, trustees under the will of the said Harriet M. Lanphere, deceased, Jennie E. Calkins, the rector, wardens and vestry of St. Mark's Episcopal Church of Coldwater, Michigan, legatees under said will, and the Attorney General, asking the court to construe the seventh, eighth, tenth and eleventh clauses of said will, and to declare the seventh and eighth to be without effect and to order the bequests under the said clauses to be distributed among said heirs-at-law. The court overruled demurrers of the appellees to the amended bill so far as the bill questioned the validity of the seventh item of the eighth clause, which directed the trustees to set apart \$500 to be applied for the permanent care and preservation of the cemetery lot in which the testatrix directed her remains to be buried, and held that item void, but sustained the demurrers as to the remainder of the bill. The complainants elected to stand by the amended bill, and it was thereupon dismissed for want of equity, and they prosecuted an appeal to this court.

The will makes the following disposition of the real and personal property of the testatrix: (1) Directs pay-

ment of debts and funeral expenses; (2) directs the disposition of the remains of the testatrix; (3) gives to Jennie E. Calkins one share of the capital stock of a corporation, \$200 in money, the clothing and writing desk of the testatrix, and the use of the dwelling house and furniture for life or until she marries; (4) gives specific legacies of chattels; (5) bequeaths to Mrs. Flora Richardson \$1000 and to Charles E. Lanphere \$200; (6) provides that lapsed legacies shall become a part of the general estate; (7) bequeaths to the rector, wardens and vestry of St. Mark's Episcopal Church of Coldwater, Michigan, \$5000; (8) gives and devises to the trustees all the rest and residue of the estate in trust for the following uses and purposes: (a) To convert the estate into personalty and sell and convey the real estate and convert the same into cash; (b) to collect moneys due and invest and re-invest the same in first mortgages or approved bonds or other securities; (c) to pay from the gross income the expenses of the trust, keep in repair and insured the dwelling house, pay the taxes and assessments thereon so long as the same may be occupied by Jennie E. Calkins and retain a reasonable amount for their services; (d) to pay Jennie E. Calkins from the income remaining \$40 per month during her natural life or so long as she may remain unmarried; (e) in case of any emergency arising by reason of serious or protracted illness of said Jennie E. Calkins, to pay out of the net income, in addition to the monthly payment, all or any part of the expenses necessarily contracted for medical, surgical or hospital care of the said Jennie E. Calkins; (f) if the net income shall not be sufficient to pay the monthly income of \$40 then to use so much of the principal as may be necessary to pay the same in full; (g) to set apart \$500 for the permanent care and preservation of the cemetery lot, which provision was held void; (h) after the payment of all the bequests and compliance with the other

conditions of the will, to pay over the moneys or securities remaining in their hands to some hospital offering care and treatment for tubercular patients, or to such corporation or society conducting such a hospital as the trustees may select; (9) appoints Potter and Field as executors and trustees; (10) directs the executors to pay \$40 per month to Jennie E. Calkins until the residue of the estate shall be received by the trustees; (11) authorizes the executors to sell and dispose of any part of the estate, real or personal.

Harriet M. Lanphere at the time of her death was the owner of the dwelling house and furniture mentioned in the third clause of the will and other real estate and personal property. The provisions of the first six clauses of the will and the bequests therein contained, as well as the devise to Jennie E. Calkins of the use of the dwelling house and furniture for life unless she should sooner marry, were not questioned by the bill, and neither was the appointment of the executors by the ninth clause, nor the direction to the executors in the tenth clause to pay \$40 per month to Jennie E. Calkins until the residue of the estate should be received by the trustees, nor the authority conferred by the eleventh clause upon the executors to sell or dispose of any part of the estate, real or personal. The seventh and eighth clauses are attacked by the bill, and the devise to the trustees of the real estate contained in the eighth clause involves a freehold. Therefore the appeal was properly taken to this court.

The appellants were successful so far as the direction that the trustees set apart \$500 for the care of the burial lot was concerned, and succeeded in thwarting the intention of the testatrix that her grave should be cared for. The court by the decree set aside and annulled that provision of the will, and the questions to be considered relate to the other provisions of the seventh and eighth clauses. By the will the trustees are authorized and directed to convert the

estate into personalty and dispose of the same as therein provided. The gift to the hospital is therefore a bequest of personal property. (*Glover v. Condell*, 163 Ill. 566; *English v. Cooper*, 183 id. 203.) Counsel for appellants contend that this bequest of the remaining moneys and securities to the hospital is void, and being void and a part of the trust scheme, without which the devise to the trustees would not have been made, the whole scheme fails and the property passes to the heirs-at-law. Therefore, beginning their argument with that final bequest, they insist that it is void because the subject matter of the gift is uncertain and the beneficiary indefinite, and because the provision violates the statute against accumulations and is obnoxious to the rule against perpetuities.

It is first argued that the subject matter of the gift is uncertain because there may be nothing remaining after paying legacies, taxes, insurance and the annuity to Jennie E. Calkins. The bill describes three pieces of real estate owned by the testatrix and alleges that she left a sum of money and personal property, so that the estate had a net value of \$37,283.61. There is no authority in the trustees, as there was in *Wilce v. VanAnden*, 248 Ill. 358, to give what remains after the death of Jennie E. Calkins to any other object than the charity, nor any authority in a life tenant to destroy the subject of the bequest, as there was in *Mills v. Newberry*, 112 Ill. 123. Other cases cited by counsel for appellants to sustain their argument are similar in principle, while in this case the bill shows no reason for saying that the annuity to Jennie E. Calkins may exhaust the estate. Aside from that fact, it is not uncertain whether there will be anything left at the death of the annuitant. The trustees are directed to pay the taxes and assessments on the homestead property and to keep it in repair so long as it is occupied by Jennie E. Calkins, and as that property cannot be disposed of until her death or marriage, it is cer-

tain to remain to be converted into cash and devoted to charity.

After discussing various other questions counsel return to the bequest for the hospital, and take the ground that it is void because the will directs an accumulation for a period prohibited by the statute restraining trusts and directions for accumulation in deeds and wills. (Laws of 1907, p. 1.) That act confines within certain limits any disposition of property so that the produce shall be accumulated, and provides that in every case where any accumulation shall be directed otherwise than is provided in the act, such direction shall be null and void, and the produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of the act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed. There is no direction in this will for an accumulation, and the testatrix did not intend any accumulation for the purpose of increasing the estate. If there should be any accumulation it will be because the income exceeds the annuity and expenses, which is uncertain, and there is no ground upon which the court could now decide any question concerning the possible accumulation. If there should be an accumulation during the lifetime of Jennie E. Calkins for a longer term than twenty-one years, it can then be determined whether it is subject to the provisions of the statute. (*Young v. St. Mark's Church*, 200 Pa. St. 332.) It is not the purpose of the statute to defeat the intention of a testator as to who should be entitled to property under a will, but only to prevent indefinite accumulations of wealth. It only limits the period of accumulation, and the produce beyond that limit goes to the same person that would have been entitled to it if the accumulation had not been directed. The statute is a copy of the Thelluson act, (39 and 40 George III, chap. 98,) and under the English decisions a trust for ac-

accumulation exceeding the limits of the statute is void only as to the excess, provided the trust would have been good before the act. (*Griffiths v. Vere*, 9 Ves. Jr. 127; *Longdon v. Simson*, 12 id. 295; *Elborne v. Goode*, 14 Sim. 164; *Mathews v. Keble*, 2 L. R. Ch. App. (vol. 3,) 691; *Frost v. Greatorex*, 2 L. R. Ch. Div. [1900] 541.) This construction conforms to the language of the act, which provides that the produce, so long as it is directed to be accumulated contrary to the provisions of the act, shall go to and be received by the person or persons who would have been entitled to it in the absence of any direction for accumulation. Accordingly, even if there had been an expressed direction for accumulation, the trust would not be void as a whole.

Aside from the statute, it is claimed that the bequest to the hospital is in violation of the rule against perpetuities because there is no first taker and the gift to the hospital may not vest within twenty-one years from the death of the testatrix. That rule applies to personal property as well as real estate and to equitable as well as legal estates, and under the rule no interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest. This will provides for an annuity to Jennie E. Calkins, but an annuity is not an estate in property; (*DeHaven v. Sherman*, 131 Ill. 115;) and that is the ground for insisting that the right or interest of the hospital must vest within twenty-one years from the death of the testatrix. The life of some person in being, with twenty-one years added, is taken as a measure of time for the application of the rule, but it is not necessary that the life taken as a part of such measure should be that of one having an interest in the estate. (Gray on Perpetuities, sec. 260; *Madison v. Larmon*, 170 Ill. 65.) In *Johnson v. Preston*, 226 Ill. 447, there was neither a precedent life estate nor was the life of anyone in being taken as a measure



of the time when the estate would vest, while here the life of Jennie E. Calkins was the utmost limit for the vesting in possession of the bequest to the hospital. Furthermore, this is a bequest to charity within the 43 Elizabeth, being a gift for the benefit of an indefinite number of persons for the purpose of relieving their bodies from disease; and bequests for charity are not subject to the rule against perpetuities,—at least unless there is some preceding estate which is void under that rule. (*Heuser v. Harris*, 42 Ill. 425; *Andrews v. Andrews*, 110 id. 223; *Crerar v. Williams*, 145 id. 625.) The rule against perpetuities was established and is enforced on grounds of public policy and on account of the public good; but the public is vitally interested in the maintenance of public charities, and for equally persuasive reasons of public policy they are to be sustained by the courts. The bequest to the hospital is not rendered void by the rule against perpetuities.

It is also contended that the bequest is void because there is no certain, ascertained or ascertainable beneficiary to take under the trust capable of asserting a right to the bequest, and because the trustees are authorized to select a hospital which is not purely charitable in its objects. The gift being to charity and the recipients of its benefits being definite and certain, it is no objection that the trustees are authorized to select a proper hospital to administer the charity. The direction of the will is that the trustees shall pay over the money or securities to some hospital offering care and treatment for tubercular patients or such a corporation or society conducting such a hospital as the trustees may select, and in making such selection the trustees are to consult with and be largely guided by the Homeopathic Medical Board of the city of Chicago as to the institution most deserving of the bequest. A valid bequest to charity may be made to a corporation not in existence, for the founding of a new college, hospital, library or other charitable institution; and it is not necessary even that the

contemplated corporation should be created, but a court of equity will uphold, protect and enforce the gift for the charitable use. (*Crerar v. Williams, supra.*) The gift to charity will not be allowed to fail for uncertainty as to the persons who are to take or because the manner specified for managing the gift cannot be carried into exact execution. (*Grand Prairie Seminary v. Morgan*, 171 Ill. 444, and *Tincher v. Arnold*, 147 Fed. Rep. 665, where the same will was under consideration.) The hospital selected must be one offering care and treatment for tubercular patients, and it is inconceivable that the testatrix intended to make a bequest for the purpose of increasing the dividends of a private hospital conducted for profit. She did not intend, and a court of equity would not permit, the diversion of the funds to such purpose. The name ordinarily implies a public institution, and the word "offering," with no condition annexed and connected with a hospital, naturally implies giving, bestowing or providing free treatment to those suffering from a disease. The trustees are authorized, in their discretion, to select a hospital of that character to administer the fund as a public charity, and the direction to take advice as to the hospital most worthy clearly implies one including charitable objects. There are trustees to take the legal title and the subject and object of the charity are definitely and clearly ascertained.

No objection is pointed out in argument to the provision for paying Jennie E. Calkins \$40 per month during her life or so long as she may remain unmarried, but the claim with respect to that provision is, that it must fail as a part of the general scheme. Even if the bequest to charity were invalid it would not affect that provision, since there is no connection whatever between the two. Objection is made to the provision for payments in case of emergency arising from serious or protracted illness, on the ground that it is void for uncertainty. The provision is, that in case of any emergency of that kind, if in the judg-

ment of the trustees it shall be necessary in order to afford proper care and treatment, they are authorized to pay out of the net income, in addition to the monthly payment, all or any part of the expenses necessarily contracted for medical, surgical or hospital care. The intention expressed by the testatrix was to afford proper care and treatment to Jennie E. Calkins, and in case of emergency to require the trustees to pay such part of the expense necessarily incurred as could not be paid with the monthly payment. A similar trust to defray the expenses or support of certain persons was upheld in *Ingraham v. Ingraham*, 169 Ill. 432, and the provision is not invalid.

The last proposition in the argument for appellants is that the gift to the Coldwater church is void because the trust is too indefinite. A gift for the support of churches is for a charitable use, (*Alden v. St. Peter's Parish*, 158 Ill. 631,) and the bequest to the rector, wardens and vestry of St. Mark's Episcopal Church is a good charitable bequest. The added statement that the money is to be used and applied, in such manner as the rector, wardens and vestry deem proper, as a memorial to the family of the testatrix does not invalidate the bequest, since the fact that the bequest is given with an intention of obtaining some benefit or from some personal motive does not rob it of its character as a charity. (*Hoeffer v. Clogan*, 171 Ill. 462; *Duror v. Motteux*, 1 Ves. Sr. 320.) The precatory words following the bequest, expressing a wish that it should be used in the purchase of real estate for the erection of permanent improvements in connection with the church property, to remain as a permanent memorial of affection for the church body and the membership thereof, were sufficient to create a trust and require that the bequest be devoted to that use, which was unquestionably of a charitable nature.

The decree is affirmed.

*Decree affirmed.*

THE VANDALIA LEVEE AND DRAINAGE DISTRICT, Appellee,  
vs. MOSES HUTCHINS *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. DRAINAGE—*Levee act in force when cause is remanded controls further proceedings.* The Levee act, as amended in 1909, requiring all assessments of benefits or damages to be by a jury, must control proceedings had after such act is in force, against property of objectors who succeeded in obtaining a reversal of the confirmation judgment entered before such act took effect, notwithstanding a portion of the same assessment against other property was made by commissioners.

2. SAME—*the court may proceed under original petition though judgment of confirmation is reversed.* The fact that the objections of certain property owners to a drainage assessment are sustained by the Supreme Court, which reverses the judgment of confirmation and remands the cause, with directions to spread the assessment under the law as then existing, does not deprive the trial court of jurisdiction to proceed further under the original petition for the assessment. (*Claussen Park Drainage District v. Daily*, 239 Ill. 428, and *Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co.* 249 id. 260, explained.)

3. SAME—*appeal or writ of error as to one piece of property does not invalidate proceedings as to other lands.* Under the Levee act an appeal or writ of error as to one or more pieces of land against which a drainage assessment has been confirmed does not impair or invalidate the organization of the district, or any of its proceedings, as to the other lands.

APPEAL from the County Court of Fayette county; the Hon. BARNEY OVERBECK, Judge, presiding.

BROWN & BURNSIDE, for appellants.

ALBERT & MATHENY, for appellee.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

The appellee drainage district was organized under the Levee act in September, 1903. A special assessment was thereafter spread and in large part collected. On March 6,

1907, on petition of the commissioners an additional assessment of \$25,000 was spread by them, over appellants' objections. On an appeal to this court (*Vandalia Drainage District v. Hutchins*, 234 Ill. 31,) we held that part of the assessment was improper, as it was for indebtedness contracted prior to the filing of the petition and because the commissioners were incompetent to spread the assessment. The judgment was reversed and the cause remanded for further proceedings not inconsistent with the opinion. After the remanding order had been filed, by leave of the county court, on July 21, 1908, the original petition was amended as to appellants only, so as to ask for \$21,050 instead of \$25,000. Pending the confirmation of this assessment a third assessment was filed, and the confirmation of the two assessments was heard by the same jury, over objections of appellants. On appeal to this court (*Vandalia Drainage District v. Vandalia Railroad Co.* 247 Ill. 114,) the judgment was again reversed and the cause remanded, with directions to spread the assessment here in question against the lands of appellants in accordance with the provisions of the Levee act as amended May 29, 1909. After this remanding order was filed in the county court, on February 6, 1911, an order was entered setting aside the former judgment of confirmation of this assessment. After various orders had been entered over the objection of appellants, a jury was summoned in accordance with the provisions of section 17a of the Levee act, as amended in 1909, to spread the assessment and after a hearing returned their verdict therein. The county court thereupon entered a judgment confirming the assessment in accordance with said verdict. From that judgment this appeal was prayed.

Of the many objections urged in the trial court only two are relied on here: First, that the trial court was without jurisdiction to order an assessment spread by a jury after previously confirming a portion of the same assessment on other property made by three commissioners; and second,

that the court was without jurisdiction to proceed further under the original petition after the objections of appellants had been sustained to this second assessment as originally entered. It is strenuously insisted that both of these objections must be sustained under the reasoning of this court in *Claussen Park Drainage District v. Daily*, 239 Ill. 428, and *Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co.* 249 id. 260. In the first named case the principal point, and the only one necessary to be decided, was that the order appealed from was interlocutory and not final. While a part of the discussion in that opinion, in construing the Levee act as it then stood, gives some basis for appellants' contention, it can have no application to the law as amended in 1909. As that act now reads, especially sections 16, 17, 17*a*, 17*b* and 37, it was clearly the intention of the legislature that the objections as to each piece of property could be tried separately, and that an appeal or writ of error as to one piece or one person should not impair or invalidate the organization of the district, or any of its proceedings, as to the lands of other persons. The Levee act now provides that all hearings of this kind in the trial court, for the purpose of making an assessment of benefits or damages, shall be before a jury and not the commissioners, the act before amendment providing that it could be either way. That part of the opinion in *Spring Creek Drainage District v. Elgin, Joliet and Eastern Railway Co. supra*, relied upon by the appellants (page 283) was with reference to the law as it stood before the amendment of 1909, as construed in *Claussen Park Drainage District v. Daily, supra*, and has no application to the law as it now reads. Manifestly, the present law, which was in force the last time this judgment was reversed and the cause remanded, must control as to all further proceedings. If this assessment could not be spread under that law for the reasons urged by appellants here, no additional assessment could ever be spread against appellants' lands,

and they would thus escape paying their due proportion of the cost of the work, all other lands in the district having paid. The Levee act cannot be so construed.

The judgment of the county court must be affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* Charles E. Landers, County Collector,  
Appellee, *vs.* THE ILLINOIS CENTRAL RAILROAD COM-  
PANY, Appellant.

*Opinion filed December 21, 1911.*

1. TAXES—*when certificate for additional road tax, under section 119, does not comply with statute.* The purpose for which an additional tax may be authorized by the voters under section 119 of the Roads and Bridges act is limited to "the constructing or repairing of roads and bridges," and a certificate of levy "for the aforesaid purposes," (referring to all of the six purposes specified in said section 119,) does not comply with the statute. (*People v. C., C., C. & St. L. Ry. Co.* 249 Ill. 160, followed.)

2. SAME—*when cross-error based on sustaining an objection to tax cannot be considered.* Cross-error assigned on the ruling of the county court in sustaining an objection to the road and bridge tax of an entire town cannot be considered, where there is nothing in the record as abstracted by appellant to show why the objection was sustained and no additional abstract of record is filed by the appellee.

3. SAME—*presumption is that tax was legally levied.* The presumption is that a tax was legally levied, and the burden is upon the objector to establish the contrary.

4. SAME—*what must be proved to show that labor system was abolished.* To support an objection to a district road tax upon the ground that there had been an election abolishing the labor system, the objector must prove not only that the report of the canvassing board showed a majority vote in favor of the proposition to abolish the labor system, but also that the election was held on proper petition and notice.

APPEAL from the County Court of Montgomery county ;  
the Hon. JOHN L. DRYER, Judge, presiding.

D. R. KINDER, (JOHN G. DRENNAN, of counsel,) for appellant.

HARRY C. STUTTLE, State's Attorney, for appellee.

MR. CHIEF JUSTICE CARTER delivered the opinion of the court :

This is an appeal from a judgment of the county court of Montgomery county against the property of appellant for \$142 on account of road and bridge tax in Bois D'Arc township and for \$115.59 for district road tax in district No. 2 in North Litchfield township, in said county.

The appellant objected to the road and bridge tax of Bois D'Arc township in excess of twenty-five cents on the \$100 valuation. That township is under the labor system. The certificate of the highway commissioners stated that the purposes of the levy were "(1) for making and repairing bridges, \$3000; (2) for payment of damages by reason of opening, altering and laying out new roads and ditches, \$2000; (3) for purchase of necessary tools, implements and machinery for working roads, \$1000; (4) for purchase of necessary materials for building, repairing and draining roads and bridges, \$1500; (5) for pay of overseers of highways during the year, \$1000; (6) for payment of outstanding orders drawn by the commissioners on their treasurer, \$2000,—being a levy of twenty-five cents on the \$100 valuation." The commissioners further certified that at the annual town meeting held on April 19, 1910, "an additional levy of twenty-five per cent on the \$100 was ordered levied by the legal voters present at said meeting, for the aforesaid purposes."

Section 119 of the Roads and Bridges act provides that the highway commissioners shall ascertain how much money must be raised "for the making and repairing of bridges, the payment of damages by reason of the opening, altering and laying out of new roads and ditches, the pur-



chase of necessary tools, implements and machinery for working roads, the purchase of the necessary material for building or repairing or draining roads and bridges, the pay of the overseer of highways during the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer," and shall levy a tax on all the real, personal and railroad property in said town, not exceeding twenty-five cents on the \$100. The section also provides that upon the giving of notice "that a larger amount of money will be required for the purpose of constructing or repairing roads or bridges in their town than can be realized from the real, personal and railroad tax authorized by law to be assessed by the commissioners," the voters may at the next town meeting authorize "an additional amount to be raised by tax, not exceeding twenty-five cents on each \$100 valuation." The question here presented is whether the words in the additional levy, "for the aforesaid purposes," can be fairly construed to mean the same as the words of the statute, "for the purpose of constructing or repairing roads or bridges." This statute must be strictly construed. Under the reasoning of this court in *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 249 Ill. 160, we think the words used in the certificate of levy cannot be construed to comply with the statute. The objection to this additional levy should therefore have been sustained by the county court.

It is further contended by appellant that the town of North Litchfield was operating under the labor system until April 10, 1910, at which time, by a majority of 330, the voters abolished that system, and that in pursuance of this action the commissioners of highways levied thirty-six cents on the \$100, and filed a certificate to that effect with the board of supervisors. Appellant objected to this tax and the trial court sustained the objections. It also objected to the district road tax in district No. 2 of North Litchfield for \$115.59. Counsel contend that this objection

should also have been sustained. There is nothing in this record to show why the trial court sustained the objection to the road and bridge tax as to the entire town of North Litchfield and overruled it as to the road and bridge tax in road district 2 of said town. The record is not abstracted as to the objection to the road and bridge tax of the entire town, and while appellee has filed cross-errors to this tax, no additional abstract was filed and no reasons are set out in the brief why the court ruled incorrectly in sustaining the objection as to this tax. This court, in this state of the record, is not required to rule on the cross-errors. In order to sustain its objection as to the \$115.59 levied for the road and bridge tax in district No. 2 of North Litchfield township, it was necessary for the appellant to prove that the election abolishing the labor system was based upon a proper petition and notice. (*Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Randle*, 183 Ill. 364; *Chicago and Northwestern Railway Co. v. People*, 193 id. 539; *People v. Toledo, St. Louis and Western Railway Co.* 231 id. 514.) No such proof was made. The only proof in the record is, that at the annual town meeting the report of the canvassing board was made that 623 votes were cast for abolishing the labor system and 293 against it. The presumption of law is that a tax is legally levied, and the burden of proof is upon the objector to establish the contrary. (*Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. People*, 212 Ill. 551.) Appellant not having proved that the election to abolish the labor system was based on a legal petition and statutory notice, this court cannot hold, on this record, that the labor system was abolished in said town. The county court therefore rightly overruled the objections as to the \$115.59 for road and bridge tax in district No. 2.

The judgment of the county court overruling the objections to the \$115.59 for road and bridge tax in district No. 2 in North Litchfield township must therefore be af-

firmed, but the judgment of the court must be reversed as to the road and bridge tax in Bois D'Arc township and the cause remanded to the county court, with directions to sustain the objection to the said additional levy for road and bridge purposes.

*Affirmed in part and reversed in part, with directions.*

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THE PEOPLE *ex rel.* Adam Koch, Appellant, *vs.* LEWIS  
RINAKER *et al.* Appellees.

*Opinion filed December 21, 1911.*

1. CONSTITUTIONAL LAW—*law authorizing the organization of municipal corporations must be available to all citizens similarly situated.* If the power exists in the legislature to authorize the organization of a municipal corporation for the preservation of forests, it is essential to a valid exercise of such power that benefits of the law shall be available to all citizens similarly situated.

2. SAME—*Forest Preserve act of 1909 is invalid.* The provisions of the Forest Preserve act of 1909 prohibiting the creation of more than one district in a county, requiring the district to be composed of contiguous territory and leaving the question of annexing new territory to the will of the voters in territory adjoining the district, give to the inhabitants of the district first organized special privileges denied to other inhabitants of the county and render the act invalid; and the validity of the act is not aided by the fact that the first district organized may include an entire county. (*Wilson v. Trustees*, 133 Ill. 443, and *Owners of Lands v. People*, 113 id. 296, distinguished.)

3. ELECTIONS—*when election to create forest preserve district is illegal.* Under the provisions of the Forest Preserve act of 1909, even conceding that the preliminary steps for the organization of a district could be taken before voting upon the adoption of the act and an election be then held, at which both the proposition to adopt the act and the proposition to create the district could be voted upon at the same time, an election cannot be sustained where the voters in parts of the county voted only upon the question of the adoption of the act, whereas the voters in other parts voted upon both questions.

4. SAME—*election to organize under referendum statute is not analogous to election to organize under the Cities and Villages act.*

An election to organize a municipal corporation under a referendum statute is not analogous to an election to organize unincorporated territory into a city or village under the general Cities and Villages act, as the Cities and Villages act is not a referendum statute and the only vote required is upon the organization.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, MAYER, MEYER, AUSTRIAN & PLATT, ROSS C. HALL, and McGOORTY & POLLOCK, (FREDERIC BURNHAM, and THOMAS MARSHALL, of counsel,) for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, and H. A. LEWIS, (JACOB NEWMAN, FRANK I. MOULTON, and CHESTER E. CLEVELAND, of counsel,) for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a judgment of the superior court of Cook county dismissing an information in the nature of *quo warranto* filed by appellant against appellees, who are assuming to hold and exercise the duties, powers and functions of commissioners of a forest preserve district organized under an act of the legislature of 1909, entitled "An act to provide for the creation and management of forest preserve districts and repealing a certain act therein named." (Laws of 1909, p. 245.) The information alleged that said act is indefinite, uncertain, unconstitutional and void; that said act was not in force when the district was organized; that the ballots used at the election for the organization of the district were not in legal form, and that the adoption of the act was not legally submitted. Appellees pleaded, setting out in detail the proceedings had before the county judge in the organization of said district, embracing the whole of Cook county, the election held for the adoption of the act, and the organization of the district

and their appointment as commissioners of said district. The plea alleges the act under which the district was organized is a valid law, that the district was lawfully organized and appellees lawfully appointed commissioners thereof. A demurrer to the plea was overruled, and appellant electing to stand by the demurrer the information was dismissed, and from the judgment dismissing the information an appeal is prosecuted to this court.

It will be necessary to an understanding of the questions discussed to refer briefly to the substance of certain sections and provisions of the act.

Section 1 authorizes the incorporation as a forest preserve district of any area of contiguous territory lying wholly within one county and containing within its boundaries one or more cities, towns or villages, upon the petition of one thousand legal voters residing within the limits of the proposed district, to the county judge of the county in which the proposed district lies, praying the submission to the legal voters of such proposed district whether it shall be organized as a forest preserve district. The petition is required to contain a definite description of the territory intended to be embraced in the district and the name of the district. The petition is addressed to the county judge, and upon filing it in the office of the clerk of the county court the county judge is required to fix a day and hour for the public consideration thereof, which shall not be less than fifteen days after filing the petition, and if two or more petitions are filed, the hearing of all of them shall be set for the same day and hour. Notice of the time and place of such public hearing is required to be published three successive days in some newspaper of general circulation in the proposed district, the last publication to be not less than five days prior to the public hearing. At such public hearing the county judge is required to hear any person owning any property in the proposed district who desires to be heard, and said county judge is authorized to

fix the boundaries of the proposed district as shall to him seem best for the interests of all parties concerned. If two or more petitions are heard at the same time, the county judge may include a part or all of the territory described in each in one district and fix such name to such district as to him shall seem appropriate, but only one forest preserve district can be created in any county. Upon the determination of the territory to be embraced in a district and the name to be given it, the county judge shall order to be submitted to the legal voters of the proposed district, at any special or general election held therein, the question of the creation of such proposed district. If a majority of the votes cast upon such question are in favor of the creation of the forest preserve district it shall thenceforth be deemed an organized forest preserve district.

Section 2 places the management of the affairs of such district in a board of commissioners, consisting of a president and four commissioners, to be appointed by the board of county commissioners or by the chairman of the board of supervisors, by and with the advice and consent of the members of said board. Each member of such board of commissioners is required to be a legal voter in the district.

Section 3 authorizes the board of commissioners to pass and enforce necessary ordinances, rules and regulations for the management and conduct of the business and property of the district. Said section also fixes the salary of the president and members of the board, and authorizes them to appoint a secretary, treasurer and such other officers and employees as may be necessary.

The fourth section provides for keeping records and making annual reports to the county commissioners or the board of supervisors, and the fifth section provides for the publication of ordinances imposing a fine or penalty or making an appropriation.

The sixth section authorizes the commissioners to designate, by ordinance, any streets, roads and highways within

the limits of the district to be used as public driveways for pleasure driving, and to improve and maintain the same; also to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve and maintain such pleasure driveways, and to exclude traffic teams from such pleasure driveways, and to provide separate roadways for the use of traffic along or parallel to such pleasure driveways, and to keep and maintain such traffic roadways at the expense of the district. But no pleasure driveway is permitted to be established by the commissioners within territory embraced in any public park district of an incorporated city, village or town without the consent of the corporate authorities of such park district, city, village or town. The commissioners are given authority to regulate and control the speed of travel on pleasure driveways, to exclude traffic teams therefrom and prescribe penalties for a violation of their ordinances. Said section authorizes the commissioners to lay out, extend, maintain and improve pleasure driveways under the provisions of any law authorizing local improvements by cities or villages.

Section 7 authorizes the commissioners to acquire, by gift, grant, devise, purchase or condemnation, lands necessary for constructing, building and maintaining pleasure driveways and forest preserves. They are given power to raise money by general taxation, to borrow money upon the credit of the district and to issue bonds therefor, but they are prohibited from incurring any indebtedness of the district exceeding one percentum of the value of the taxable property as ascertained by the last equalized assessment for State and county purposes. The aggregate amount of taxes levied for any one year, exclusive of the amount levied for payment of interest and principal on bonded indebtedness, cannot exceed the rate of one mill on each dollar.

Section 9 provides for annexation of territory adjoining any forest preserve district to said district. This may be done by filing a petition, signed by not less than ten

per cent of the legal voters residing within the adjoining territory proposed to be annexed, with the county judge, and the question of annexation shall be submitted to the legal voters within the territory proposed to be annexed, at the next general election held in said territory. If a majority of the votes cast at such election upon said question shall be in favor of annexation, such territory shall be annexed and become a part of such forest preserve district.

Section 10 prescribes the duties of the president of the board of commissioners and authorizes him to veto any ordinance, and when an ordinance is vetoed it shall not be effective unless it be again passed by the unanimous vote of all the members of the board.

Section 12 authorizes the board, by gift, devise, dedication, purchase or condemnation, to acquire any land abutting on or in the vicinity of the forest preserve district or pleasure driveway, necessary or appropriate to control the surroundings of such district or pleasure driveway, and the title to land so acquired shall be in fee simple absolute, and shall not terminate or be defeated by abandonment of the use for which it was acquired. The board of commissioners may, by ordinance passed by affirmative vote of all the members, sell and dispose of any lands acquired by it, subject to approval by the board of county commissioners or board of supervisors.

Section 13 authorizes the commissioners to acquire and hold lands for the erection and maintenance thereon of public buildings for the use of the general public for recreation and assembly purposes of a general and not of a religious character, to acquire and hold lands surrounding the said buildings or connected therewith, and to manage, control, improve, maintain and beautify such lands and buildings. Said section 13 further provides: "Any forest preserve district organized under this act shall have power to acquire and hold land for the purpose of protecting and preserving the flora and fauna and scenic beauties of the



State; to protect and preserve such lands as nearly as may be, in their natural condition for the purpose of the education, pleasure and recreation of the public; to provide and maintain all necessary, convenient and appropriate pleasure driveways, paths, and other means of access to such district."

Section 14 repeals a former act, and section 15 is as follows: "This act shall be submitted to a vote of the legal voters of any of the aforesaid districts at any general or special election. The ballots to be used at said election in voting upon this act shall be in substantially the following form:

For the adoption of an act to provide for the creation and management of forest preserve districts and repealing a certain act therein named.	
Against the adoption of an act to provide for the creation and management of forest preserve districts and repealing a certain act therein named.	

If a majority of the legal voters of said district voting on the question at such election shall vote in favor of consenting to this act, the same shall thereupon take effect and become operative at once."

The grounds upon which a reversal of the judgment is asked may be divided into three principal heads: (1) That the act of 1909 violates section 22 of article 4 of the constitution of this State; (2) that the act embraces subjects not expressed in the title, in violation of section 13 of article 4 of the constitution; and (3) that the act of 1909 was never legally adopted and the creation of the district was never legally submitted to the voters of the territory embraced therein.

Counsel for the appellees insist that forest preserve districts are not among the subjects specifically enumerated in section 22 of article 4, and are therefore not within the pro-

hibition against the passage of local or special laws. Section 22 of article 4 prohibits the passage of any local or special law granting special privileges or immunities "to any corporation, association or individual." Conceding that the word "corporation," as there used, means private corporations and not municipal bodies, is the act under consideration discriminative between citizens in that it confers special privileges on some which are denied to others similarly situated? If the power exists in the legislature to authorize the organization of corporations for the preservation of forests, it is necessary to a valid exercise of that power that the benefits of the law shall be available to all citizens similarly situated upon complying with the requirements of the act. The question here involved is not like the question involved in *Wilson v. Board of Trustees*, 133 Ill. 443, and *Owners of Lands v. People*, 113 id. 296. Those cases held that the formation of sanitary districts and drainage districts was not within the prohibition of section 22 of article 4. The acts authorizing the formation of such corporations were available to the citizens of all localities who desired to avail themselves of their benefits and were willing and able to comply with their provisions. The organization of a district in one locality or part of a county did not preclude the people from organizing districts in other localities or other parts of a county. Those acts did not discriminate against citizens similarly situated. This court, in *Douglas v. People*, 225 Ill. 536, quoted from *People v. Hazelwood*, 116 id. 319: "Laws are general and uniform, and hence not obnoxious to the objection that they are local or special, when they are general and uniform in their operation upon all in like situation." In *Jones v. Chicago, Rock Island and Pacific Railway Co.* 231 Ill. 302, it was said: "By that provision of our constitution (section 22 of article 4) a guaranty is given that all valid enactments of the legislature shall be uniform in their operation upon persons and property, and by it all citizens are assured the equal

protection of the laws of the State." In *Millett v. People*, 117 Ill. 294, the court quoted with approval from *Wally's Heirs v. Kennedy*, 2 Yerg. 554: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void."

Appellees argue that the act under consideration does not authorize any particular individual or set of individuals to form a corporation, but simply provides for the creation and management of public corporations. It is true the act does not designate any person or persons by name, but it is as highly discriminative and as unequal in its operation as if it did do so.

A proposed district must be of contiguous territory, must lie wholly within one county, must contain within its boundaries one or more cities, towns or villages, and must be petitioned for by one thousand legal voters residing within its limits. Subject to those requirements the act authorizes the organization of a forest preserve district embracing any extent in area, not exceeding the limits of the county. It may consist of one township in a county having a dozen or more townships, if the one township has the requisite number of legal voters and contains within its boundaries one or more cities, towns or villages. When a district is organized, no matter how small the territory embraced within it and how large the territory in the county outside the district, and no matter how much "flora and fauna and scenic beauties" there may be in the county not embraced in the district, no other district can be organized in that county, for the act expressly provides "that only one forest preserve district may be created in any county." There is no requirement in the statute that a forest preserve district must embrace a forest. Unless such meaning is

given it by implication, a district could be organized of territory containing no forest. While the title of the act indicates it was intended that a district could only be organized where it embraced a natural forest within its limits, yet a reading of the statute leaves it open to grave doubt whether it does not authorize organizing a district in the prairie, without any forest whatever in it. But however that may be, it cannot be denied that if a district must have a forest in it, when one district is organized, however small the forest it contains, and though there may be hundreds or thousands of acres of other forest in the county outside the district, no other district can be organized in that county. It is true, a district may be organized embracing the entire county; but this is not required, and if the requisite number of legal voters of only a part of the county embracing one or more cities, villages or towns petition for its organization into a district it may be so organized. The legislature contemplated that the legal voters of two or more sections of the same county might petition for the organization of their respective territories into a forest preserve district at the same time, for the act provides that if two or more petitions are filed the public hearing upon all petitions shall be set for the same day and hour, and if two or more petitions come on for a hearing at the same time, the county judge may include part or all of the territory described in each petition in one district. Obviously, territory described in two or more petitions could not be included in one district unless such territory was contiguous. If two petitions described territory lying in different parts of the county, not contiguous,—perhaps miles apart,—both tracts could not be organized into one district, and the county judge would be required to decide, arbitrarily, which of the two petitions he would grant. The desirability of “protecting and preserving the flora and fauna and scenic beauties” might be as great in the one case as the other, but the tracts not being contiguous they could not be embraced in one district,

and when one district is organized the power to organize districts in that county is exhausted. Clearly, that would be granting a special privilege and franchise to be enjoyed by the citizens of the locality who were first in securing the organization of their territory as a district and withholding the same privilege and franchise from others situated under like circumstances. In *People v. Cooper*, 83 Ill. 585, the court said that it is the substance and not the mere form given to an enactment which must determine its constitutionality. "If the act must necessarily produce a result clearly and unquestionably forbidden by the constitution it cannot be upheld, whatever may be its form or profession." The provision for annexing territory adjoining an organized forest preserve district does not aid the act. Whether such adjoining territory is annexed depends upon whether the owners petition therefor. If they do not choose to do so, territory separated from the district by their lands can not be annexed or organized into another district. We are not unmindful of the rule that the presumptions are in favor of the validity of the law and in a case of reasonable doubt are to be resolved in favor of the act, but here, in our view, there can be no doubt the statute is clearly in violation of both the letter and the spirit of the constitution.

It is further contended that the act violates section 13 of article 4 of the constitution of Illinois, which provides that no act shall embrace more than one subject, and that shall be expressed in the title. In view of the fact that we hold the act is invalid on other grounds it is not essential that we pass upon this question. However, it will not be out of place to discuss the scope of the act and call attention to the subjects which it is claimed are not expressed in its title, and, to say the least, give rise to serious question whether the act does not violate the constitution in the respect claimed.

To the ordinary mind a forest preserve district would mean one organized for the purpose of acquiring, protect-

ing and preserving natural forests. Such a purpose is expressed in section 13 of the act. But section 6 authorizes the board of commissioners to designate the whole or any part of any streets, roads, boulevards or other highways within the limits of such districts for pleasure driveways, to lay out, improve and maintain other pleasure driveways, and to construct roadways for the use of traffic teams when they are excluded from the pleasure driveways. Section 13 gives the commissioners power to acquire and hold lands for the erection and maintenance thereon of public buildings for the use of the public for recreation and assembly purposes. It would undoubtedly have been competent to have provided in the act all reasonable means for carrying out its provisions for organizing and maintaining forest preserve districts. This might reasonably include the building of roads or driveways for going to and from and through the forest the district is organized to preserve. Section 6, however, is unfortunately worded if that was the intention of the act. That section gives the commissioners authority to designate the whole or any part of any road or highway "within the limits of such district" as a pleasure driveway and to improve and maintain the same. By the letter of the act, when a district embraces a county and is organized to preserve a forest in one part of it, power is given the commissioners to designate any, or even all, of the public highways as pleasure driveways and improve and maintain them, although the law giving county and township authorities jurisdiction over public highways is not repealed nor intended to be repealed. The erection of buildings in the forest for shelter and rest may be a reasonable incident to the power to preserve and maintain the forest, but it seems a pretty wide stretch of that power to say it includes the erection of buildings for assembly purposes. A much greater portion of the act, consisting of fifteen sections, is devoted to defining the powers and pre-

scribing the duties of the commissioners with reference to the construction of driveways and buildings than is given to the requirements necessary for protection of forests. If these features to which we have called attention, and others not mentioned, do not bring the act within the constitutional provision that no act shall embrace more than one subject and that shall be expressed in the title, they at least show the question is one of grave doubt.

The act with reference to voting upon its adoption and upon the organization of a forest preserve district presents a curious situation. Section 1 requires the submission of the question of the organization of a forest preserve district to the legal voters of the proposed district. Section 15 provides that in order that the law may go into effect and become operative, the question of its adoption must be submitted to the legal voters "of any of the aforesaid districts" at a general or special election and consented to by a majority of them voting upon that question. If a majority of the votes upon that question are in favor of adopting the law it then takes effect and becomes operative. It is difficult to see how a "district" can vote on the adoption of the act before any district is organized, and it is equally difficult to see how the necessary steps required can be taken for the organization of the district until there is a law in effect authorizing the proceeding. But if all the preliminary steps for the organization of a forest preserve district could be taken before voting upon the adoption of the law and then both questions submitted to be voted upon at the same time, the election in this case would be required to be held invalid.

The question of the adoption of the law was submitted to all the voters of Cook county, but the creation of the proposed forest preserve district was not submitted to any of the voters of said county except those residing in the city of Chicago and the town of Cicero. The ballots voted

by the voters of the city of Chicago and the town of Cicero were in the following form:

For the adoption of an act to provide for the creation and management of forest preserve districts and repealing a certain act therein named, and creating under said act a forest preserve district, the boundaries of which to coincide with and comprise the whole of the territory of Cook county, Illinois.	•
Against the adoption of an act to provide for the creation and management of forest preserve districts and repealing a certain act therein named, and creating under said act a forest preserve district, the boundaries of which to coincide with and comprise the whole of the territory of Cook county, Illinois.	

The ballots voted in the rest of the county were in the following form:

For the adoption of an act to provide for the creation and management of forest preserve districts and repealing a certain act therein named.	
Against the adoption of an act to provide for the creation and management of forest preserve districts and repealing a certain act therein named.	

It will be seen that the voters in Chicago and the town of Cicero voted both upon the proposition of adopting the act and creating a forest preserve district with boundaries to coincide with the boundaries of Cook county, while all the rest of the voters of the county voted only upon the proposition of the adoption of the act. Appellees contend that the addition to the ballot of the city of Chicago and town of Cicero of the proposition of creating a forest preserve district was surplusage and did not affect the legality of the election. We do not see how this can be so, for section 1 expressly provides that "upon the determination by



said county judge of the territory to be embraced in such district and the name to be given thereto, such county judge shall cause to be entered upon the records of the county court of such county an order fixing and defining the boundaries and the name of such proposed district, and thereupon he shall order to be submitted to the legal voters of such proposed district at any special or general election held therein the question of the creation of such proposed district." The situation is not analogous to an election under the Cities and Villages act for the organization into a city or village of unincorporated territory. The Cities and Villages act is not a referendum statute, and inhabitants of territory desiring to organize under the provisions of said act are only required to vote upon the question of organization. The act itself is effective for all who desire to organize under its provisions, and its operation is not dependent upon a vote for or against its adoption.

Another peculiarity of the act before us is that it does not provide how the question of its adoption may be caused to be submitted to the voters, as is the case with other referendum statutes. Whether that defect is sufficient to render the law inoperative or not, by its plain provisions it cannot take effect until adopted by a vote, and a forest preserve district cannot be created under it except by a vote of the legal voters residing in the district. It seems too plain for argument that a large number of the voters of Cook county having been deprived of the privilege of voting upon the organization of the county into a forest preserve district, the election was illegal and the organization invalid.

The court erred in overruling the demurrer to the plea of appellees and dismissing the information. For that error the judgment is reversed and the cause remanded to the superior court, with directions to sustain the demurrer.

*Reversed and remanded, with directions.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. THOMAS LEWIS, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. RAPE—*evidence of complaint is not admissible unless prosecutrix testifies.* In a prosecution for rape, where the prosecutrix testifies, it may be proved by third persons that the prosecutrix complained to them that the crime had been committed upon her, if such complaint is made without inconsistent and unexplained delay; but such evidence is admissible only to corroborate the testimony of the prosecutrix and not to prove the commission of the offense, and is not admissible (unless part of the *res gestæ*) where the prosecutrix does not testify. (*People v. Weston*, 236 Ill. 104, distinguished.)

2. SAME—*when it is reversible error to admit evidence of complaint.* In a prosecution for rape upon a woman of mature years, who was dead at the time of the trial, it is reversible error to permit her nephew to testify that she told him a rape had been committed upon her, where the other competent evidence is not conclusive of the guilt of the accused but is such that the jury might have believed that the act of intercourse was committed with the woman's consent.

3. SAME—*when instructions permitting a conviction for assault with an intent to commit rape should not be given.* Instructions in a prosecution for rape which permit the jury to find the accused guilty of an assault with intent to commit rape should not be given, where the evidence, if believed, is conclusive that the act of sexual intercourse was complete, so that the jury, if they believed the act was forcible and against the will of the woman, could have returned no other verdict than that of guilty of the crime of rape.

WRIT OF ERROR to the Circuit Court of Montgomery county; the Hon. A. M. ROSE, Judge, presiding.

HOGAN & WALLACE, for plaintiff in error.

W. H. STEAD, Attorney General, and HARRY C. STUTTLE, State's Attorney, (MICHAEL J. McMURRAY, of counsel,) for the People.

Mr. JUSTICE COOKE delivered the opinion of the court:

Plaintiff in error was indicted and tried in the circuit court of Montgomery county for the crime of rape. A verdict of guilty was returned and he was sentenced to ten years in the penitentiary.

The evidence on the part of the People tended to show that on the evening of October 9, 1910, plaintiff in error, a young man twenty-seven years of age, drove to the home of a neighbor, Luther Weller, and while there Margaret Ann Weller, a lady about fifty-nine years of age, together with her two little grand-daughters, aged six and eleven years, respectively, came to the same place; that plaintiff in error remained at the Weller home until after Mrs. Weller and her grandchildren had departed, leaving a few minutes thereafter; that he overtook Mrs. Weller and the children, who were riding in a single buggy, drove past them, tied his horse to a tree, and returning, stopped the horse being driven by Mrs. Weller, took her forcibly from the conveyance and ravished her by the roadside. Mrs. Weller died on November 24, 1910, but it is not claimed that the alleged assault contributed in any way to cause her death. As this trial was held at the January, 1911, term of the Montgomery circuit court, the only witnesses produced on the part of the People to prove the actual commission of the alleged assault were the two little girls.

Plaintiff in error contends that, admitting all the evidence on the part of the People to be true, the facts proven do not constitute any crime; that an incompetent witness was permitted to testify; that incompetent evidence was admitted on the part of the People, and that the court erred in giving certain instructions asked on behalf of the People.

The testimony of the two little girls relative to the assault was practically the same. They each testified that after the plaintiff in error had driven around them, tied his horse and returned, he stopped the horse their grandmother was driving and climbed into their buggy; that he

entered into conversation with Mrs. Weller and that he talked to her and she talked to him. They did not attempt to detail any of the conversation, but agree that plaintiff in error then seized hold of Mrs. Weller and pulled her from the buggy. The evidence is not clear as to the manner in which this was done nor as to what resistance was offered by Mrs. Weller. The girls both testified, however, that all three of them were "hollering," and the older girl testified that plaintiff in error told them if they did not shut up and keep quiet he would kill them, and if he killed one he would kill all. The testimony of the girls shows that plaintiff in error pulled Mrs. Weller out of the buggy and that when she reached the ground she was standing upon her feet, and the only evidence of any resistance made by her at any time is that the older girl says at that time she held to the buggy. Both girls say that plaintiff in error and Mrs. Weller then walked about three paces to the grass at the side of the road; that he laid Mrs. Weller upon her back and put up her clothing; that he stood up beside her and unbuttoned his own clothing, she lying on the ground meanwhile; that he then exposed his privates and got on top of her; that after a few minutes he arose, and without saying a word went to his own buggy, and she, likewise saying nothing, arose and joined the girls in her buggy. The testimony of both the children is, that from the time plaintiff in error and Mrs. Weller left the buggy until after the act was completed Mrs. Weller made no outcry, said nothing and made no resistance. Other evidence tending to corroborate the claim that an assault had been made was that of a neighbor living some distance away, who testified that he heard outcries from about the place where the assault was alleged to have been committed and at the time specified by the girls, and the testimony of a physician who was called shortly after the assault was alleged to have occurred and who examined and treated Mrs. Weller. He testified that he found a torn and loosened condition of the

viscera on the left side and that it was bleeding; that this condition could have been occasioned by any sort of external violence, but he did not believe that voluntary sexual intercourse would cause such an abrasion.

After the assault is alleged to have been committed Mrs. Weller and the two little girls drove to the home of a nephew of Mrs. Weller. This nephew was called as a witness, and over the objection of plaintiff in error testified, on behalf of the People, as to the physical condition of Mrs. Weller when she reached his place and to her statement that she had been raped on the highway by Tommy Lewis. Upon objection being made, the answer of the witness that she had stated that she had been raped by plaintiff in error was stricken out and the jury were instructed not to consider it. The witness was then permitted, over objection, to testify that Mrs. Weller had stated at that time that she had been raped out there on the road. It is this testimony which plaintiff in error contends was incompetent. Any statement made by Mrs. Weller in the absence of plaintiff in error, under the ordinary rules of evidence, was hearsay. In a prosecution for rape, where the prosecutrix herself testifies, it may be proven by third persons that the prosecutrix made complaint to them, provided such complaint was made without inconsistent or unexplained delay. This constitutes an exception to the general rule that hearsay evidence is inadmissible, and is allowed on the supposition that a woman thus assailed will avail herself of the first opportunity to tell of the wrong which has been done her. The proof of such statements is admissible, however, only upon the theory that it tends to corroborate the testimony of the prosecutrix given upon the trial. It is not proper to make such proof for the purpose of showing the commission of the offense itself, and this proof cannot be made at all if the prosecutrix is not a witness. (*Stevens v. People*, 158 Ill. 111; *State v. Wheeler*, 116 Iowa, 212; *State v. Wolff*, 118 id. 564; *Johnson v. State*, 17 Ohio, 593; *Horbeck v.*

*State*, 35 Ohio St. 277; *Welden v. State*, 32 Ind. 81; *People v. McGee*, 1 Denio, 19; *Phillips v. State*, 9 Humph. 246.) As Mrs. Weller died prior to the trial this testimony became incompetent and it was error to admit it.

The People rely upon *People v. Weston*, 236 Ill. 104, in support of the contention that this evidence was admissible. In the *Weston* case the statement of Mrs. Eason was admissible upon other grounds than those urged here. Before Mrs. Eason was assaulted her husband and McElyea ran to the neighbors for help, and when they returned they came upon the plaintiffs in error, in that case, while they were in the act of assaulting Mrs. Eason. The statements testified to by McElyea were made at that time and were admissible as a part of the *res gestæ*. In this case the statements of Mrs. Weller were not made at a time when they could be proven as a part of the *res gestæ*, and, in fact, it is not claimed by the People that they are admissible upon that ground.

The People urge that if it was error to admit this proof it should be held to be harmless, for the reason that there is other competent evidence which so clearly proves the commission of the crime that the verdict must have been the same had this evidence been excluded. We do not agree with that contention. It cannot be said that the other evidence is so clear as to the commission of the crime of rape that the jury would not have been warranted in bringing in any other verdict than that of guilty. In the absence of any proof of the physical condition of either of the parties or of any disparity in strength the jury might have believed, from the competent evidence in the record, that intercourse was had with the consent of Mrs. Weller. The plaintiff in error denied the commission of the act, and testified that after leaving the home of Luther Weller he did not see Mrs. Weller or her grandchildren. In view of the death of Mrs. Weller it was error to admit testimony of any statements made by her in reference to the commission

of the alleged assault, and considering the whole record the error is of so grave a character that it must result in a reversal of the judgment.

Plaintiff in error contends that the trial court erred in permitting the younger of the two girls to testify because of her youth and her lack of knowledge of the meaning of an oath. This child at the time of the trial was six years of age. She was examined both by the State's attorney and the court, and cross-examined by counsel for plaintiff in error, as to her ability to comprehend the meaning of an oath, as to her knowledge of right and wrong and as to her understanding of the moral obligation to speak the truth. From her whole examination we are unable to say that the court abused its discretion in permitting the child to testify. She disclosed that she understood the difference between right and wrong, that she appreciated the moral obligation to speak the truth, and that she understood when she was sworn that it meant she was to tell the truth. "Intelligence, ability to comprehend the meaning of an oath and the moral obligation to speak the truth, and not age, are the tests by which the competency of a child to give testimony is determined." (*Shannon v. Swanson*, 208 Ill. 52.) The jury saw and heard the child testify, and it was for them to determine the weight and value which should be given to her testimony.

Complaint is made of the giving of instructions 2, 3, 6, 7, 8 and 10 on behalf of the People. Instruction No. 2 stated, in the language of the statute, that an assault with intent to commit murder, mayhem, robbery, larceny or other felony shall subject the offender to imprisonment in the penitentiary not less than one nor more than fourteen years. The eighth instruction was to the effect that if the jury believed plaintiff in error made an assault upon Mrs. Weller with intent to forcibly ravish her they should find him guilty of an assault with intent to commit rape. The giving of these instructions cannot be said to have been

prejudicial to plaintiff in error, but under the state of the record neither of them should have been given. It is undoubtedly true that under an indictment for rape the defendant may be found guilty of an assault with intent to commit rape, as the higher and more atrocious crime embraces all the elements of the lesser offense. It is only, however, in cases where the evidence requires or permits it, that the jury may convict of the crime of assault with intent to commit rape under an indictment charging the crime of rape. (*Prindeville v. People*, 42 Ill. 217.) In this case, if the jury believed any crime had been committed they would not have been warranted in indulging a doubt that the crime committed was rape and not an assault with intent to commit rape. The testimony of the two children, if believed, was conclusive that the act of sexual intercourse had been complete, and if the jury believed that this assault had been committed forcibly and against the will of Mrs. Weller they could have returned no other verdict than that of guilty of rape. These two instructions simply amounted to an invitation to the jury to return a compromise verdict, which the facts would not warrant. They had no place in the series and should not have been given.

It is urged that the third instruction given for the People is erroneous in that it omits to state the age and sex of Mrs. Weller. The indictment alleges that Mrs. Weller was a female, the proof is undisputed that she was a female, and this instruction is not subject to the criticism made.

Complaint is made of instruction No. 6 on the ground that other instructions had already been given stating the same proposition of law there laid down. The court would have been warranted in refusing to give the instruction on the ground that it was a mere repetition, but it was not error to give it.

The objection to instruction No. 7 is, that it calls particular attention to the facts testified to, such as the taking of Mrs. Weller forcibly out of the buggy, throwing her up-



on the ground and forcibly having carnal knowledge of her. This instruction is unobjectionable and was properly given.

Instruction No. 10 is objected to upon the ground that it is an attempt to minimize and destroy the purpose for which evidence of good reputation is permitted. The instruction is substantially the same as the one approved in *Hirschman v. People*, 101 Ill. 568, and it was not error to give it.

For the reasons indicated the judgment of the circuit court is reversed and the cause remanded.

*Reversed and remanded.*

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WILLIAM L. BEELER *et al.* Defendants in Error, *vs.* JAMES B. BARRINGER, Exr., Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. WILLS—*right to elect a conversion or re-conversion does not depend upon right to present enjoyment.* The right of a devisee to elect a conversion or re-conversion of money into land or land into money is not dependent upon the devisee's right to the present enjoyment of the gift at the time the election is made.

2. SAME—*right to elect a re-conversion cannot defeat time for distribution.* The right of a devisee to elect to take the land instead of the proceeds of the sale thereof defeats the intention of the testator to distribute his estate in money, but it cannot defeat his intention as to the time for distribution, so as to give the beneficiaries the use and enjoyment of the gift at an earlier period than if no election had been made.

3. SAME—*when equity may direct a re-conversion.* Where a will devises the residue of the testator's property to the executor, with directions to convert the land and personalty into money and divide the proceeds among the testator's four children as they respectively become of age, a court of equity may direct a re-conversion so that the children will retain the land even though some of them are minors, if they all agree thereto and it appears to be for their best interests; but in such case the control and management of the land should be left in the hands of the executor, as trustee, until the time for distribution.

WRIT OF ERROR to the Circuit Court of Montgomery county; the Hon. THOMAS M. JETT, Judge, presiding.

AMOS MILLER, and D. R. KINDER, for plaintiff in error.

J. T. BULLINGTON, and LANE & COOPER, for defendants in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is a writ of error sued out to review a decree of the circuit court of Montgomery county for the re-conversion of personal property into real estate.

It appears from the allegations of the amended bill that Joseph Beeler died testate February 4, 1907. He left surviving him Frances E. Beeler, his widow, and William L. Beeler, Bertie E. Beeler, Della P. Beeler and Joseph E. Beeler, his only children and heirs-at-law. At the time of Joseph Beeler's death, besides a considerable amount of personal property, he owned a homestead in the city of Hillsboro whereon he resided with his family, and also two farms in Montgomery county,—one of 320 acres and the other of 97 acres. By the second paragraph of his will he gave his widow the homestead and \$3000 in money in lieu of all interest she might otherwise have in his estate as his widow. By the third paragraph he gave his oldest son, William L. Beeler, \$1000, to be paid to him on his arriving at the age of twenty-one years. By the fourth paragraph the testator devised the residue of his estate to James B. Barringer (whom he nominated in the will as executor) in trust, with directions to convert the personal estate into money as soon after the testator's death as could be done consistently with the best interests of the estate. The testator directed that the executor or trustee keep the farm of 320 acres rented until such time as in the judgment of said executor it could be sold for the best price, but the will directed that it be sold within three years after the

testator's death. The testator expressed a desire that the other farm should be kept so that his sons might have land to farm, but authorized its sale at such time as the executor might deem best. The will directed that the testator's property, and his personal estate, should be reduced to money, and after the payment of the legacies to his widow and oldest son it be divided into four equal parts, and one part paid to each of his four children as they arrived at the age of twenty-one years, respectively. The will further directed that the executor or trustee keep the proceeds of the sale invested in safe securities, at the best rate of interest obtainable, until the time for distribution. All four of the testator's children were complainants in the bill. Three of them, being minors, appeared by their guardian, L. V. Hill, who had been duly appointed by the probate court of Montgomery county and had qualified as such guardian. William L. Beeler, the oldest son, is an adult. Bertie E. Beeler was seventeen, Della P. Beeler thirteen and Joseph E. Beeler ten years of age at the time of the hearing in the circuit court. The bill, after describing the land and the purposes for which it was being used, alleged that it was for the best interest of all four of the children to have, own and enjoy the land, rather than the money that might arise from the sale by the executor; that all four of said children of the testator had signed a writing electing to take the land instead of the proceeds of its sale; that said writing was also signed by the guardian of the minor children; that it was under seal, acknowledged before a notary public and recorded in the office of the recorder of deeds; that the guardian had reported said election to the probate court and the same had been approved by said court. The bill further alleged that the executor threatened to and had given notice that he would sell the land at public sale on a day named, and prayed that he be enjoined from making such sale and that the court confirm the election of complainants to take the land or make the election for the

minors, if necessary, and that the executor be decreed to release, by quit-claim, all interest in said land as executor or trustee. A temporary injunction was granted, and after a hearing upon bill, answer and replication the court entered a decree in accordance with the prayer of the bill. The executor has sued out this writ of error to review that decree.

There is no controversy upon the proposition that under the will the defendants in error took no title to the land; that where land is devised and by the terms of the will is directed to be converted into money and the money distributed to the devisees and legatees, it is a devise of money and not of land. Neither is there any controversy that under such a devise, if the devisees are under no disability and all agree to do so, they may elect to take the land instead of the money. Plaintiff in error also concedes that a "court of equity may, if it appears to be to the advantage of an infant, direct a re-conversion in his behalf, if at the time of such re-conversion the infant is presently entitled to the fund." It is contended, however, that the right to elect a re-conversion only exists where the beneficiary, whether adult or minor, is entitled to the present enjoyment of the fund or property.

By the will of their father defendants in error would become entitled to the possession and use of the gift upon their respectively attaining the age of twenty-one years. But one of them had arrived at that age when the bill in this case was filed and the decree entered thereon, and the youngest was but ten years old. We do not think the right of a devisee to elect a conversion or re-conversion of money into land or land into money is dependent upon his right to the present enjoyment of the gift at the time the election is made. It is true, there is a dictum to the contrary in *Hetsel v. Barber*, 69 N. Y. 111, but the question was not involved in that case. In *Hale v. Hale*, 146 Ill. 227, and *Gorman v. Mullins*, 172 id. 349, a conversion of land

into money before certain beneficiaries were entitled to the enjoyment of the gift was sustained. In the *Hale* case the testator was a resident of the State of Massachusetts. He left a large estate, consisting of real and personal property. Some of his real estate was situated in the city of Chicago. Among other things, the will provided for the payment of life annuities of different amounts to a number of persons, relatives of the testator, and at the death of the last annuitant the residue of the estate, together with the accumulated interest, was to be equally divided among the testator's grandchildren. The executors and trustees under the will filed a bill to sell the land belonging to said estate situated in this State, and alleged that it was non-productive and was causing great expense in taxes and special assessments, and that it was to the best interest of all parties interested that it be converted into money for their benefit. Three of the parties interested in the distribution of the estate at the death of all the annuitants were minors and several of the annuitants were living at the time the bill was filed. The circuit court decreed a sale of the Illinois land. The case was brought to this court for review and the decree of the circuit court was affirmed. In the opinion the rule of conversion and re-conversion is elaborately discussed and many authorities cited and reviewed. Among other things the court said, on page 249: "The next question is whether the court below, sitting as a court of chancery, had the power to authorize the sale of the lands in question and the re-investment of the proceeds. Decisions are to be found in the English reports which hold that courts of equity have no power, by virtue of their general jurisdiction over minors, to order the sale of the minor's real estate for the purpose of education, maintenance or investment, and that is probably the prevailing doctrine in England. The same rule seems to have been adopted by some of the courts of this country. The principal reason for denying this jurisdiction in England appears to be, that by changing

the nature of the minor's estate from real to personal or from personal to real, the rights of third persons who will be entitled in case of the minor's death will be materially affected, as in that country real and personal property descend in different channels. That reason, it is very manifest, does not obtain in this country, as here both species of property go by descent or distribution to the same persons. The interference of the court, therefore, in sanctioning a conversion of the property from real to personal or from personal to real does not materially affect the rights of the persons who, in case of the minor's death, may become entitled to succeed to his estate. But even in England cases are to be found where the power to authorize a change in the nature of the estate of minors has been exercised and upheld, where such changes were manifestly for the minor's benefit. (See *Inwood v. Turner*, 1 Ambler, 417; *Earl of Winchelsea v. Norcliff*, 1 Vern. 434.) In this country, from an early day, courts of the highest respectability have refused to follow the English rule, and have held that where it is for the benefit of the minor, courts of equity have the power, by virtue of their general jurisdiction over the estates of minors and others under disability, to authorize a change from real to personal and from personal to real." In *Gorman v. Mullins*, *supra*, the devise was of real estate to the testator's sister, two full brothers and a half brother, to hold and rent and divide the annual net income equally among them until a nephew and niece of the testator arrived at the age of twenty-one, when the property was to be turned over to them. The half brother died and one of the other brothers released his interest in the property to his brother and sister before the nephew and niece became twenty-one years of age. The brother and sister, who were entitled to all the net income from the property, filed a bill alleging that the property was rapidly deteriorating in value; that it was of no rental value, and would continue to decrease until the nephew and niece

arrived at the age of twenty-one. The bill alleged it could be sold for a fair value for manufacturing purposes, and prayed that complainants be authorized to sell it and invest the proceeds in interest-bearing securities for their benefit and the benefit of the nephew and niece. The nephew and niece were made defendants to the bill. A decree was entered authorizing the sale of the property by the brother and sister of the testator and the investing of the proceeds until the nephew and niece arrived at the age of twenty-one, when the brother and sister were directed to turn over the proceeds of the sale, without interest, to the nephew and niece, in equal shares. The nephew and niece brought the case to this court by writ of error and this court affirmed the decree of the circuit court.

In both these cases, when the conversion occurred there were minors who were interested in the gifts when the time for distribution should arrive, but the time for the distribution and the enjoyment of the gifts by the minors had not arrived when the conversion was authorized. While in those cases there was a conversion of land into money, the law is equally applicable to a re-conversion of money into land. The principles are the same. There is this difference between the *Hale* and *Gorman* cases and the case at bar: In neither of those cases was the gift accelerated, and the minors for whose benefit, among others, the conversion was decreed did not go into the possession or enjoyment of the gift immediately upon the property becoming converted, while in this case the decree perpetually enjoins the executor from selling the land, and directs him to release to them, by quit-claim, all right or interest in its control or enjoyment.

We are of opinion there was no error in decreeing a re-conversion and enjoining the sale of the land, but that part of the decree directing the trustee and executor to release and turn the land over to the minors at once was erroneous. The duty was imposed by the will upon the trus-

tee of managing and controlling the property of the minors until they, respectively, arrived at the age of twenty-one years. Until the land was sold he was to manage and control the land, and when it was sold the proceeds were to be invested by him in safe securities at the best rate of interest obtainable, and kept so invested by him until the time fixed for distribution arrived. Re-conversion defeats the distribution of the testator's property in money, but the right of re-conversion does not carry with it the right to defeat the will of the testator that the possession and enjoyment of the property should be postponed until the beneficiaries, respectively, became twenty-one years old. Under the evidence the chancellor was justified in concluding that it was for the best interests of the minor defendants in error that they take the land instead of the proceeds of its sale, but the election to do so did not authorize a disregard of the will fixing the time at which the beneficiaries should come into its enjoyment. The control and management of the property of the minor defendants in error should be left in the trustee until the time fixed by the will for distribution.

The decree, therefore, for re-conversion and enjoining the sale of the land by the executor and trustee will be affirmed, but that part of said decree directing the executor and trustee to quit-claim and release the property to the beneficiaries will be reversed and the cause will be remanded to the circuit court, with directions to enter a decree in accordance with the views expressed in this opinion. The costs of this appeal will be taxed to the executor, to be paid in due course of administration.

*Affirmed in part, reversed in part and remanded.*



THE PEOPLE *ex rel.* W. W. Gifford, County Collector, Appellee, *vs.* AUGUSTUS J. BELZ *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. SPECIAL ASSESSMENTS—*what objections cannot be made on application for judgment and order of sale.* On an application for judgment and order of sale for a delinquent special assessment no objection can be made which could have been raised on the application for judgment of confirmation unless such objection goes to the jurisdiction to enter the judgment of confirmation; and the lack of jurisdiction must appear upon the face of the record.

2. SAME—*what matters do not go to jurisdiction to confirm an assessment.* The facts that the record of the confirmation proceedings does not show that an affidavit had been filed showing service of notice of the passage of a sidewalk ordinance or that the property owners were given forty days in which to build the walks cannot be urged for the first time on application for judgment and order of sale, as such matters do not go to the jurisdiction of the court to determine the question whether or not the assessment should be confirmed.

3. SAME—*conclusiveness of confirmation judgment is the same although it is rendered by default.* The fact that a confirmation judgment is rendered by default, after notice, does not affect the conclusiveness of such judgment as to objections which might have been urged in the proceeding for confirmation.

APPEAL from the County Court of Will county; the Hon. GEORGE J. COWING, Judge, presiding.

FRED MORIARTY, for appellants.

WILLIAM C. MOONEY, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application by the county treasurer and *ex officio* collector of Will county, in the county court of said county, for judgment and order of sale against certain lots belonging to appellants, situated in the city of Joliet, to pay a special assessment levied under the Local Improvement act to pay for the construction of a five-foot cement side-

walk on each side of a portion of Richards and Taylor streets, in said city. The appellants appeared and filed objections to judgment and order of sale, which were overruled and judgment and order of sale were entered, and this appeal followed.

The objections urged are, that it was not made to appear in the confirmation proceedings that an affidavit of service of notice of the passage of the sidewalk ordinance within ten days after its passage had been filed with the official report of such assessment, as provided in section 34 of the Local Improvement act, or that the appellants had been given forty days in which to construct the sidewalk in front of their property before proceedings to spread such assessment were commenced in the county court.

Section 34, so far as it is material, reads as follows: "Whenever any ordinance shall provide only for the building or renewing of any sidewalk, the owner of any lot or piece of land fronting on such sidewalk shall be allowed forty (40) days after the time at which the said ordinance shall take effect in which to build or renew such sidewalk opposite to his land, and thereby relieve the same from assessment: *Provided*, the work so to be done shall in all respects conform to the requirements of such ordinance. Notice of the passage of such ordinance shall be sent by mail within ten days after such passage to the person who paid the taxes on said premises for the preceding year, if he or they can be found in said county, and also a like notice addressed to the 'occupant' of said property, if the same be at such time actually occupied, and an affidavit of such service shall be filed with the official report of such assessment. Such affidavit shall be *prima facie* evidence of a compliance with said requirements." (Hurd's Stat. 1909, p. 462.)

The law is well settled that no objection to an assessment can be made on application for judgment and order of sale which could have been raised on the application for

confirmation unless it goes to the jurisdiction of the court to enter the judgment of confirmation, (*Phillips v. People*, 218 Ill. 450,) and which lack of jurisdiction must appear upon the face of the record. (*People v. Martin*, 243 Ill. 284.) In this case the record of the proceedings to confirm the assessment were introduced in full, from which it appeared that those proceedings were regular throughout and that the county court rightfully rendered the judgment of confirmation, unless it was lacking in jurisdiction by reason of the fact that the affidavit of service provided for by section 34 was not filed with the official report of the assessment and that proof was not made before confirmation that the appellants had had forty days in which to construct the sidewalk in front of their property before the proceedings for confirmation were commenced. The statute conferred upon the county court jurisdiction of the confirmation of special assessments, and the application for confirmation of this particular assessment conferred jurisdiction upon the county court of this assessment and the giving of the statutory notice authorized the county court to proceed to confirm the assessment. The questions, therefore, as to whether proper proof was made of the service of notice of the passage of the ordinance, or whether the appellants were given the statutory period allowed to construct the sidewalk in front of their property before the confirmation proceedings were commenced, were questions which could have been properly raised in the county court upon the application for confirmation. While it may be true that proper proof of notice of the passage of the ordinance was not filed and the appellants were not given the statutory period in which to construct the sidewalk, these questions did not go to the jurisdiction of the court to hear and determine the question whether the assessment should be confirmed. Had the appellants raised the questions now sought to be raised and they had been decided adversely to their contention upon the application for confirmation, they

could have had those questions reviewed in a direct proceeding. They cannot, however, have them reviewed on an application for judgment and order of sale for the non-payment of the assessment, as that would be to review them in a collateral proceeding. The fact that the judgment of confirmation was rendered by default can make no difference. The appellants had notice of the application for confirmation, and they were then required to appear and raise all questions which they desired to raise which showed the assessment ought not be confirmed and which did not go to the jurisdiction of the court, and if they failed to appear and a judgment of confirmation was entered against their lands they and their property are bound by that judgment. Clearly, if the appellants had appeared and objected to confirmation on the grounds now urged against the judgment and order of sale, and their contentions had been overruled and the assessment confirmed, they would have been barred. In that event it must be conceded the county court would have had jurisdiction to pass upon the questions now raised, and the jurisdiction of a court cannot rest, so far as the questions decided are concerned, upon which way those questions are decided.

We therefore conclude that the county court had jurisdiction to confirm the assessment, and that the questions whether there was proof of notice as required by section 34, or whether the appellants were given the statutory period in which to construct the sidewalk, cannot properly be reviewed upon the application for judgment and order of sale. The county court did not, therefore, err in rendering the judgment appealed from.

The judgment of the county court of Will county will be affirmed.

*Judgment affirmed.*

WILLIAM LEONARD *et al.* Plaintiffs in Error, *vs.* JOSEPH GARLAND *et al.* Defendants in Error.

*Opinion filed December 21, 1911.*

1. INJUNCTION—*when question whether court erred in denying a motion for temporary injunction is not involved.* The question whether the court erred in denying a motion for a temporary injunction is not involved on appeal from an order dismissing the bill at a subsequent term, where there is no certificate of evidence in the record showing what facts were before the court on the hearing of the motion.

2. SAME—*when denial of motion for temporary injunction may be treated as a final disposition of case.* The denial of a motion for a temporary injunction on a bill filed only for injunctive relief may be treated as a final disposition of the case, where there is no equity in the bill and it is apparent that it cannot be made good by amendment.

3. SAME—*when a bill states a good cause for equitable relief.* A bill showing, by proper averments, that drainage commissioners have fraudulently conspired with a contractor to pay such contractor a large amount from public funds for worthless tile work the contractor is putting in, in violation of the contract for such work, states a good cause for equitable relief, and a court of equity may, by injunction, prevent such illegal use of the public funds.

4. SAME—*when dismissal of bill cannot be sustained as having been for want of equity.* The mere fact that a motion for a temporary injunction was denied does not warrant the assumption that the dismissal of the bill at a subsequent term, on motion of the defendant, was for reasons disclosed on the hearing of the motion for a temporary injunction, where the facts shown on such hearing are not preserved for review, and the bill, on its face, states a good cause for equitable relief.

5. PRACTICE—*when bill should not be dismissed on motion of defendant.* Where a bill states a good cause for equitable relief it is error to dismiss the bill on mere motion of the defendant unless the complainant has been guilty of inexcusable delay in prosecuting the suit.

6. SAME—*power to dismiss suit for want of prosecution should be exercised reasonably.* The power of the court to dismiss a suit in chancery for want of prosecution must be exercised reasonably and with due regard to the rights of litigants, and it is error to dismiss a bill, on motion of the defendant and over the objection

of the complainant, before the case is reached for trial, where the bill states a good cause for equitable relief and no rule has been entered requiring the complainant to take any steps toward the final disposition of the case.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. RICHARD M. SKINNER, Judge, presiding.

BUTTERS & ARMSTRONG, for plaintiffs in error.

JOHN GARLAND, D. L. DUNAVAN, and CHARLES S. CULLEN, for defendants in error.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Plaintiffs in error, who are owners of land in Drainage District No. 1 of the towns of Freedom and Ophir, in LaSalle county, filed their bill in the circuit court of that county October 29, 1908, against the drainage commissioners and the Northwestern Clay Manufacturing Company, for an injunction to restrain them from proceeding with the construction of a tile drain contrary to the specifications for the work. On November 5, 1908, plaintiffs in error moved for a temporary injunction and the hearing was set for November 14. On that date the commissioners of the district and the manufacturing company filed their several answers. Affidavits appear to have been filed by the parties, and upon hearing the motion for a temporary injunction was denied. No further action was taken at that time and nothing further was done at the succeeding January and March terms of court. On July 7, 1909, at the June term, defendants in error entered a motion to dismiss the bill, which was allowed and the bill dismissed. From the order dismissing the bill plaintiffs in error appealed to the Appellate Court for the Second District, where the de-

cree of the circuit court was affirmed. The record has been brought here for review by writ of *certiorari*.

The bill was for injunction, only. Plaintiffs in error contend the motion to dismiss should be treated as a general demurrer to the bill and be denied unless the bill shows a want of equity upon its face. Whether the court erred in refusing the preliminary injunction is not involved at this time. There is no certificate of evidence in the record showing what facts were before the court on the hearing of the preliminary motion. Reasons may have existed which would justify the court in refusing the temporary injunction other than a failure of the bill to show a case for equitable relief. A motion to dissolve a temporary injunction for want of equity in the bill, under the rule established in this State, operates as a demurrer to the bill and is considered as an admission of the material allegations thereof. The decree dissolving such injunction is, in effect, a denial of the relief sought, and the bill may be at once dismissed and the action of the court reviewed on error, or appeal. (*Titus v. Mabee*, 25 Ill. 232; *Shaw v. Hill*, 67 id. 455; *Smith v. Kochersperger*, 173 id. 201; *Weaver v. Poyer*, 70 id. 567; *Heinroth v. Kochersperger*, 173 id. 205.) The same rule applies when the injunction is the only relief sought and the motion to dissolve is heard upon bill, answer and affidavits. In such case the dissolution of the injunction may be treated as a final disposition of the cause, from which an appeal will lie. (High on Injunctions, sec. 1706; *Prout v. Lomer*, 79 Ill. 331; *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 id. 210.) The practice is similar and is followed with like results where a court denies a motion for a preliminary injunction on a bill filed only for injunctive relief, where there is no equity in the bill and it is apparent that it cannot be made good by amendments. (*Thomas v. Adams*, 30 Ill. 37; *Vieley v. Thompson*, 44 id. 9; *Hummert v. Schwab*, 54 id. 142; *Brockway v. Rowley*, 66 id.

99; *Grimes v. Grimes*, 143 id. 550; *Canal Comrs. v. Village of East Peoria*, 179 id. 214; *Leonard v. Arnold*, 244 id. 429.) It is error to dismiss a bill which states a good cause for equitable relief, on the mere motion of the opposite party, unless the complainant has been guilty of inexcusable delay in prosecuting the suit. The power of a court to dismiss a suit for failure to prosecute it with due diligence, where no sufficient cause is presented, exists independently of statute. (14 Cyc. 444; *Sanitary District of Chicago v. Chapin*, 226 Ill. 499.) The bill in this case states a good cause of action. It shows by proper averments that the drainage commissioners had fraudulently conspired with the Northwestern Clay Manufacturing Company to pay said company more than \$4000 of public funds for worthless tile work that said company was installing in a drainage ditch, in violation of the contract under which the work was being done. A court of equity has jurisdiction to prevent, by injunction, such improper and illegal use of public funds. (*Heinroth v. Kochersperger*, *supra*.) The decree below cannot be sustained on the ground that there was no equity in the bill. While the power to dismiss a cause for want of prosecution, where there has been long and unexplained delay, is conceded, the power should be exercised reasonably and with due regard to the rights of litigants. Where a case is reached for trial regularly on the call and the plaintiff fails to appear and the defendant is present insisting upon a disposition of the cause, the court may properly dismiss the case for want of prosecution. (*Delano v. Bennett*, 61 Ill. 83.) The court may also dismiss a cause for non-compliance with the rule entered against the plaintiff to file a pleading or take some other step in the cause, where no sufficient excuse is given. (*White v. Hogue*, 18 Ill. 150.) We do not hold that there may not be other reasons than the ones illustrated by the above cases which would authorize a court to dismiss a cause for the want of prosecution. There is nothing in



this record upon which the decree can rest, unless it be held that the delay from October 29, 1908, until the 7th day of July, 1909, is of itself evidence of such unreasonable delay as to warrant the dismissal of the suit for that cause alone. The case had not been reached for trial. Plaintiffs in error were in court and objected to the dismissal of the bill. No rule had been entered against plaintiffs in error requiring them to take any steps looking toward the final disposition of the case. The action of the court below cannot be sustained on the alleged ground of a failure to prosecute the suit with due diligence. The court erred in dismissing this bill.

The judgment of the Appellate Court and the decree of the circuit court are reversed and the cause remanded to the circuit court, with directions to proceed in conformity with the views herein expressed.

*Reversed and remanded.*

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THE PEOPLE *ex rel.* William D. Voss *et al.* Appellees, *vs.*  
JAMES D. O'CONNELL *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*only parties to a suit may appeal, but a writ of error is not so limited.* Only parties to a suit may appeal, as that is a privilege conferred by statute and is only given to the parties, but a writ of error is not so limited in its application, and, being a new suit, may be prosecuted as a matter of right in civil cases by anyone who is a party or privy to the record, or who is injured by the judgment or is competent to release error.

2. MANDAMUS—*Mandamus act contemplates that rights of all persons interested shall be adjudicated in one suit.* The purpose of the provision of the Mandamus act authorizing the court to require any person to be made a defendant who claims or appears to the court to have an interest in the subject matter, is to have the rights of all persons having or claiming an interest in the subject matter adjudicated in one proceeding.

3. SAME—when policemen may sue out writ of error to reverse *mandamus* judgment. Police officers who were originally made defendants to a *mandamus* suit but against whom the petition was dismissed by an order entered *nunc pro tunc* as of the day the judgment ordering the writ as prayed was rendered are entitled to a writ of error to reverse such judgment, even though the judgment would not be *res judicata* as to their rights and interests, where the effect of the judgment is a decision that their appointment is illegal, as in such case they will be directly benefited by a reversal. (*Winstanley v. People*, 92 Ill. 402, distinguished.)

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Superior court of Cook county; the Hon. BEN M. SMITH, Judge, presiding.

FYFFE & ADCOCK, for appellants.

HOYNE, O'CONNOR & IRWIN, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellants sued out a writ of error from the Appellate Court for the First District to bring before that court for review the record of a *mandamus* proceeding in the superior court of Cook county, and assigned errors upon the record certified and returned by the clerk of the superior court. The Appellate Court refused to consider the errors assigned, and dismissed the writ of error on the ground that the appellants had no right to the writ because they had no interest in the subject matter of the suit and were not affected by the judgment. The Appellate Court granted a certificate of importance and an appeal to this court.

The appellees, William D. Voss, Robert J. Blaney, John J. Gavin and John Q. Reilly, filed their petition for *mandamus* in the superior court, and the amended petition made the city of Chicago, the civil service commissioners, the su-

perintendent of police, the city comptroller, the appellants, (thirty-four police officers,) and ten other policemen, defendants. The amended petition represented that the petitioners were policemen of the city of Chicago; that prior to November 9, 1906, the civil service commissioners, in the classification of positions in the police department, had kept three separate lists for detective sergeants, patrol sergeants and desk sergeants; that Voss, Blaney and Gavin had taken promotional examinations for the position of desk sergeant and secured a percentage which entitled them to be placed on the eligible list for that position, which was done; that Reilly had taken a promotional examination for the position of patrol sergeant and secured a percentage which entitled him to be placed on that eligible list, which was done; that on said November 9, 1906, the civil service commissioners adopted a resolution reciting that all of the sergeants in the three lists were in the same rank, grade or division of the service and all received the same compensation, and the needs of the service would be better conserved by having only one list; that the secretary was ordered to make a single list of desk sergeants, detective sergeants and patrol sergeants, and the persons on the three lists should rank in the consolidated register or list in the order of said percentages; that a consolidation was made and a single list prepared; that the consolidated list was made by giving to each person who had passed an examination on either of the three lists the position on the consolidated list to which his percentage entitled him; that the examination for the different lists had been upon a different basis and gave different weight to different features of the examination; that the effect of the consolidation of the three lists was to put others before the petitioners in the consolidated list and prevent the certification and appointment of the petitioners by certifying others ahead of them with higher percentages; that forty-five other persons, including the thirty-four appellants, had been certified and appointed from

the consolidated list; that if the consolidation had not been made the petitioners would have been certified and appointed to positions of the rank or grade for which they, respectively, took the examinations, but by reason of the consolidation the others were certified and appointed ahead of them; and that the consolidation was unlawful and void and should be set aside. The prayer was for a peremptory writ commanding the civil service commissioners to vacate and set aside the order of consolidation; the general superintendent of police to notify, in writing, the civil service commissioners of all vacancies existing or created since November 9, 1906, in the separate lists in the positions known as desk sergeant, patrol sergeant and detective sergeant; the civil service commissioners to certify the names eligible for promotion from the separate lists as they existed prior to the order for consolidation, and to certify the names of Voss, Blaney and Gavin for the position of desk sergeant and Reilly for the position of patrol sergeant; the general superintendent of police to promote them upon such certification and notify the civil service commissioners of their promotion and appointment and the city comptroller to place their names on the pay-roll of the city for such positions.

The record is in a most confused condition and it is difficult to make any intelligible statement of its contents. It shows, however, that on February 15, 1908, the court overruled a demurrer of the city, and on February 17, 1908, overruled a demurrer of certain officers, leaving another demurrer, and perhaps other pleadings, undisposed of, and ordered the peremptory writ as prayed for, with a judgment for costs against defendants. Afterward, on April 4, 1908, the record recites that the petition was dismissed as to the appellants and certain other defendants, to which exception was taken; that the court overruled the demurrer of the city and its officers and again awarded the peremptory writ and rendered judgment for costs against the city and its officers. On that day a bill of exceptions was filed re-

citing matters which are a part of a common law record, without any bill of exceptions. Finally, on May 6, 1910, the court ordered that the order of April 4, 1908, be entered *nunc pro tunc* as of February 17, 1908.

Only parties to a suit can appeal, because that is a privilege conferred by statute which is only given to parties, and if it be considered that the effect of the *nunc pro tunc* order was that the appellants were not parties when the judgment was rendered, they could not appeal. But a writ of error is not so limited in its application: It is the beginning of a new suit for the correction of errors of inferior courts, and may be prosecuted as a matter of right in all civil cases by any one who is either a party or privy to the record, or who is injured by the judgment or will be benefited by a reversal, or is competent to release error. (*Anderson v. Steger*, 173 Ill. 112.) In that case the court ordered the defendant in a bill for divorce to pay to the clerk, for the use of the solicitor for the complainant, \$1028 for solicitor's fees. The Appellate Court reversed the decree, and the solicitor was not a party to the suit in either court. His client refused to take an appeal from the judgment of the Appellate Court, but he was permitted to prosecute a writ of error from this court because he was injured by the judgment of the Appellate Court. The general rules were stated in that case, and it cannot be doubted that substantial legal rights of the appellants, who held the positions which they occupied, were directly put in issue and collaterally determined in the *mandamus* suit. The decision that the consolidation was illegal was a decision that the appellants were not legally appointed. But whether they would have had a right to the writ apart from the provisions of the act governing that proceeding or not, their right must be considered in the light of such provision. Of course, it is essential that all necessary parties shall be joined as defendants in the original proceeding, and the Mandamus act provides that if any other person than the original defend-

ant shall appear to the court to have or claim any right or interest in the subject matter, such person may be made a defendant, and may be summoned and appear and plead, answer and demur in the same manner as if he had been made a defendant in the original petition.

In *Powell v. People*, 214 Ill. 475, we considered a question substantially like the one here involved. That was a proceeding by *mandamus* against the civil service commissioners, and the petition alleged that they had certified for the appointment of chief sanitary inspector Charles B. Ball, who was not eligible because a non-resident, and he had been appointed and inducted into said office under the certification. The prayer was for a writ commanding the commissioners to withdraw the certification and to certify the relator, who was next on the list. The court awarded the writ and the judgment was reversed because Ball was not made a defendant, and if the judgment had force and effect according to its command, the effect would be to cancel the certification of Ball and deprive him of the legal right and authority to hold his position. That case is not distinguished from this by saying that there was here no command to put the appellants out of their positions, since there was no command in that case to remove Ball, and the trial court would have had no power to do so if it had made the attempt. If the judgment in this case is to have effect, the consolidation is to be set aside and the lists restored as they were on November 9, 1906, thereby determining that appellants were not legally appointed. The purpose of the provision in the Mandamus act is that the rights and interests of all parties claiming any right or interest in the subject matter shall be adjudicated and determined in a single action, and in *People v. Blocki*, 203 Ill. 363, where there was a petition for *mandamus* to compel the commissioner of public works to remove switch tracks from a street, we held that the court properly permitted an occupant of land adjacent to the tracks to become a party. The

appellants are as much interested in the subject matter of this suit as the petitioners, the interest of the petitioners being to set aside the consolidation and the interest of the appellants being to maintain it. The right of the appellants to hold their positions depends upon the success of the defense. They are the only ones having any valuable or substantial interest in maintaining the consolidation. Their case is not at all like that of *Winstanley*, which was passed upon in this court in *Winstanley v. People*, 92 Ill. 402. In a *mandamus* proceeding to compel the payment of money by the county collector to the relator, *Winstanley* filed a so-called interpleader claiming the money, and it was held that the *Mandamus* act did not give any person claiming an interest in the subject matter of the proceeding the right to interplead and become a plaintiff or relator asking for affirmative relief. It was held that the act contemplated bringing in persons to defend against the relator, and not for another coming in as plaintiff or actor and making a triangular suit. It was said that *Winstanley* appeared in the attitude of one who insisted on becoming plaintiff in a suit he did not bring, and if he deemed himself entitled to the money he might have brought his action for it. That is not the case here, where the appellants were not seeking any affirmative relief, but, having an interest to defend the resolution and consolidation, were made defendants for that purpose. They assigned for error in the Appellate Court, among other things, the order of the court dismissing the petition as to them as well as the judgment whereby their rights were collaterally determined. A judgment in a cause to which the appellants had ceased to be parties would not be *res judicata* as to their rights and interests, and some subsequent proceeding would be required to oust them from their positions, as in the case of *Ball*, perhaps resulting in different opinions and contrary judgments of courts of concurrent jurisdiction; but if the judgment in the *mandamus* suit had been different and had sustained the

consolidation and the certification and appointment of appellants they would have been secure in their positions so far as the relators were concerned. They would therefore be directly benefited by a reversal of the judgment.

The Appellate Court erred in dismissing the writ of error, and its judgment is reversed and the cause is remanded to that court, with directions to consider and decide upon the errors assigned.

*Reversed and remanded, with directions.*

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THE CITY OF CHICAGO, Defendant in Error, *vs.* THE UNION ICE CREAM MANUFACTURING COMPANY, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. MUNICIPAL CORPORATIONS—*ordinances must not be in conflict with general laws of the State.* Municipal ordinances must be in harmony with the general laws of the State and in case of a conflict the ordinance must give way, but the mere fact that the State has legislated upon a subject does not necessarily deprive a city of power to deal with the subject by ordinance.

2. SAME—*Pure Food law did not deprive cities of police power over sale of adulterated foods.* The passage of the Pure Food law of 1907 did not deprive cities and villages of the power given by the provisions of article 5 of the Cities and Villages act to regulate the sale of impure or adulterated food by ordinances not inconsistent with such statute, and the fact that an ordinance attaches a less penalty than the statute does not amount to such a repugnancy between the two as invalidates the ordinance.

3. SAME—*police regulations of a city may differ from those of State.* Police regulations enacted by a city under a general grant of power may differ from those of the State upon the same subject, provided they are not inconsistent therewith.

WRIT OF ERROR to the Municipal Court of Chicago; the Hon. JUDSON F. GOING, Judge, presiding.

McMAHON & CHENEY, for plaintiff in error.



WILLIAM H. SEXTON, Corporation Counsel, and JAMES S. McINERNEY, Prosecuting Attorney, (EDWIN J. RABER, of counsel,) for defendant in error.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is a quasi-criminal action instituted by the city of Chicago against the Union Ice Cream Manufacturing Company, a corporation, to recover a fine for the violation of section 1160 of the municipal code of Chicago of 1905, which reads, in part, as follows: "Any person or corporation, or any agent or employee thereof, who shall keep for sale, offer for sale or exchange, or shall sell or deliver or expose for sale, any \* \* \* food which shall be impure, unwholesome, adulterated, or to which any harmful or injurious foreign substance has been added, shall be fined not less than \$5 nor more than \$100 for each offense." On a hearing before the court the plaintiff in error was found guilty and fined \$100 and costs. This writ of error is based on a certificate of the trial court that the validity of a municipal ordinance was involved and the public interests required the case to be taken direct to this court.

The sole question involved here is whether the above section of the municipal code is in force since the so-called Pure Food act went into force, July 1, 1907. (Hurd's Stat. 1909, p. 2118.)

It is first insisted by counsel for plaintiff in error that the Pure Food act, being the latest announcement of the legislature, repeals, by implication, all laws and parts of laws repugnant to its provisions. If we understand the argument, it is to the effect that while article 5 of the City and Village act of 1872 formerly gave the city council of Chicago authority to pass such an ordinance as here in question, under the general power therein conferred to regulate the sale of provisions, pass police ordinances and

do all acts necessary and expedient for the promotion of public health, yet the legislature clearly, under our system of government, may resume the power so delegated and in that way deprive the municipalities of the right to exercise it; (*City of Chicago v. Burke*, 226 Ill. 191, and cases cited;) that the Pure Food law of 1907, covering the same subject, manifestly was intended to repeal, by implication, the authority granted to cities by said act of 1872 to regulate the sale of impure or adulterated food. Whatever force there may be in that argument as presented here, it is nullified by the fact that said article 5 of the City and Village act was amended and entirely re-enacted by the legislature as an emergency act December 31, 1907, (Laws of 1907-8, Adj. Sess. p. 36,) so that the part of the City and Village act as it stands at present on the statute book, authorizing cities and villages to make regulations for the promotion of health or suppression of disease, became a law six months after said Pure Food act.

The laws of the State operate within the limits of municipal corporations the same as elsewhere, unless otherwise clearly provided by municipal charters or statute. Local laws and regulations are at all times subject to the paramount authority of the legislature. Did the legislature intend by the passage of the Pure Food act, in 1907, to deprive municipal authorities of all power to legislate on subjects touched upon or regulated by said act? Clearly not. Said act has certain provisions with reference to milk and its measurement, but this court has held since its passage that a municipality could regulate by ordinance the size of the bottles or jars in which milk was sold. (*City of Chicago v. Bowman Dairy Co.* 234 Ill. 294.) There are also many provisions in said Pure Food act with reference to food. We recently held that a municipality could pass an ordinance regulating the sale and weight of bread. (*City of Chicago v. Schmidinger*, 243 Ill. 167.) The Pure Food act also has regulations with reference to liquors, but no

one would claim that municipalities are deprived, since the passage of that act, of any of their former authority to regulate and control the sale of intoxicating liquors. See *Gardner v. People*, 20 Ill. 431; *City of Pekin v. Smelzel*, 21 id. 464; *Fant v. People*, 45 id. 259.

We think it is clear that the Pure Food act was not intended to deprive cities and villages of the authority given by the provisions of article 5 of the City and Village act to regulate and control, by ordinances not in conflict with said Pure Food law, the sale of foods, including such regulation as provided in said section 1160 of the revised municipal code of Chicago. Municipal ordinances must be in harmony with the general laws of the State and with the municipal charter. In case of a conflict the ordinance must give way. The great weight of authority is to the effect that the legislature may confer police power upon a municipality over subjects within the provisions of existing State laws. An act may be a penal offense under the laws of the State, and further penalties, under proper legislative authority, may be imposed for its commission by municipal ordinances. The enforcement of one would not preclude the enforcement of the other. (Cooley's Const. Lim.—6th ed.—239; 2 Dillon on Mun. Corp.—5th ed.—sec. 633; 28 Cyc. 696, 698; 2 McQuillin on Mun. Corp.—1911 ed.—sec. 888; Ingersoll on Public Corp. sec. 119; *Jones v. City of Atlanta*, 4 A. & E. Ann. Cas. (Ga.) 2, and note; *Seattle v. MacDonald*, 17 L. R. A. (N. S.) 49, and note.) Municipal corporations are bodies politic, vested with many political and legislative powers for local government and police regulations, established to aid the government by the State. The necessity for their organization may be found in the density of the population and the conditions incidental thereto. Because of this, the municipal government should have power to make further and more definite regulations than are usually provided by general legislation and to enforce them by appropriate penalties. (2 Dillon

on Mun. Corp.—5th ed.—sec. 632; *Territory v. McCandless*, 13 A. & E. Ann. Cas. 795, and note.) This court, in *Wragg v. Penn Township*, 94 Ill. 11, after reviewing the authorities on this subject at length, (quoting from the Federal decisions to the effect that the same act could be an offense against both the Federal and the State governments, and that a party might be convicted for violating both statutes without being twice put in jeopardy for the same offense,) held that the legislature had the power to make an act punishable one way under the general State laws and punishable in a different way by the authorized ordinances of a municipal corporation. See, also, *Robbins v. People*, 95 Ill. 175; *Baldwin v. Murphy*, 82 id. 485; *Seibold v. People*, 86 id. 33; *Hankins v. People*, 106 id. 628.

Municipal authorities cannot, under a general grant of power, such as article 5 of the City and Village act, adopt ordinances which infringe the spirit of a State law or are repugnant to the policy of the State as declared by general legislation, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith. (*McPherson v. Village of Chebanse*, 114 Ill. 46.) This ordinance does not prohibit what the statute permits. While the ordinance attaches a less penalty for its violation than does the statute, we find no repugnancy between them. The general policy under both is the same.

The conclusion that the ordinance in question is not in conflict with the Pure Food act is supported by the great weight of authority and is in harmony with sound public policy.

The judgment of the municipal court will be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Ona L. Cline, County Collector, Appellee, *vs.* THE WABASH RAILROAD COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. TAXES—*an additional road tax can be levied only to meet a contingency.* The contingency which will authorize an additional tax levy, under section 14 of the Roads and Bridges act, must be some unusual or extraordinary event in the nature of a casualty which does not happen in the ordinary course; and the certificate of the highway commissioners must state that the tax is desired to meet a contingency and must state what the contingency is.

2. SAME—*washing away of bridge by freshet is a contingency contemplated by statute.* Heavy rains, floods and freshets which result in damage to roads, washing out of grades and culverts and undermining foundations and embankments are not unusual and may be anticipated as likely to occur from year to year, and the repairs occasioned thereby must be provided for out of the ordinary tax; but a freshet which results in carrying away and destroying a bridge is not usual, and is a contingency within the meaning of section 14 of the Roads and Bridges act, providing for an additional tax.

APPEAL from the County Court of Piatt county; the Hon. ELIM J. HAWBAKER, Judge, presiding.

C. F. MANSFIELD, and F. M. SHONKWILER, (C. N. BROWN, of counsel,) for appellant.

HICKS & DOSS, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

An additional road and bridge tax of twenty-five cents on each \$100 valuation was extended against the property of the appellant in Sangamon township, in Piatt county, upon the certificate of the highway commissioners and consent of the board of town auditors that such additional rate was required "for the specific and sole purpose of building a bridge and approaches in Madden Lane road across Madden run, in said town; emergency having arisen for the

construction of said bridge by reason of a former bridge across said Madden run having been destroyed and swept away by a freshet." This appeal is from the judgment of the county court overruling the appellant's objection to the tax so extended and entering judgment against its property.

Section 14 of chapter 121 of Hurd's Statutes of 1909 provides for the levy of an additional road and bridge tax in view of some contingency, upon the certificate thereof by the highway commissioners with the consent of a majority of a board consisting of the board of town auditors and the assessor. The certificate of the commissioners must state that the tax is desired to meet a contingency and must state what the contingency is, and the contingency must be some unusual or extraordinary event in the nature of a casualty which does not happen regularly and in the ordinary course. (*People v. Lake Erie and Western Railroad Co.* 248 Ill. 32.) The contingency here fulfilled this requirement. Heavy rains and freshets or floods may be expected at certain seasons of the year. They are usual occurrences, and so are the resulting consequences of damage to roads, washing out of grades and culverts and undermining of foundations and embankments. (*People v. Toledo, St. Louis and Western Railroad Co.* 249 Ill. 175.) Such results of storms or floods as may usually be anticipated as likely to occur from year to year are not extraordinary, and the repairs required in consequence of their happening must be provided for out of the ordinary tax. But a freshet which results in the carrying away and destruction of a bridge is out of the ordinary course. It does not ordinarily happen and cannot be anticipated. (*People v. Illinois Central Railroad Co.* 249 Ill. 142.) The certificate stated such a contingency as authorized the levy of the additional tax.

*Judgment affirmed.*

ANNA LOUISE GARRETT, Plaintiff in Error, vs. ROBERT L.  
GARRETT, Defendant in Error.

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*question of residence of complainant in divorce case is open to consideration in Supreme Court.* The question of the residence of the complainant in a suit for divorce goes to the jurisdiction of the subject matter of the suit, and is open to consideration in the Supreme Court though the point was not raised or passed upon in the Appellate Court.

2. SAME—*what question cannot be considered in the absence of cross-errors.* A finding by the Appellate Court that the evidence justified the jury in finding the husband guilty of extreme and repeated cruelty and habitual drunkenness cannot, in the absence of cross-errors, be questioned on writ of error by the wife to review the judgment of the Appellate Court, which reversed the decree of the trial court in her favor upon the ground that both parties were equally guilty.

3. DIVORCE—*divorce is a remedy provided for innocent party.* Where each party has cause for divorce against the other of the same statutory character neither can be granted a divorce, and a defendant charged with extreme and repeated cruelty may show in defense that the complainant was equally cruel.

4. SAME—*what must be considered where husband defends on ground that wife was cruel.* Where a wife sues for divorce on the ground of extreme and repeated cruelty and the husband defends on the ground that the wife was equally cruel, the relative rights of the parties which the marriage has created, and the physical constitutions and temperaments of parties, must be considered.

5. SAME—*clear case is required to justify granting divorce to husband for cruelty of wife.* It must be a clear case which will justify a court in granting the husband a divorce on the ground of extreme and repeated cruelty by the wife, and it is not sufficient to show slight acts of violence on her part, where there is no reason to suppose he will not be able to protect himself by the exercise of his marital rights.

6. SAME—*when wife's acts of violence do not preclude her getting a divorce for cruelty.* Where the evidence shows that the defendant was guilty of gross acts of violence and cruelty toward his wife, acts of violence on her part, consisting mainly in resisting his ill-treatment or provoked by his inexcusable conduct, are not a defense and do not bar her right to a divorce.

7. *SAME*—*what does not show that wife was guilty of habitual drunkenness.* The facts that the wife occasionally drank intoxicating liquor at her husband's request to keep him from getting angry at her, and that for a time she drank beer on her physician's advice, do not make a case of habitual drunkenness, such as constitutes a defense to a charge of habitual drunkenness on the part of the husband, which is clearly established.

8. *SAME*—*verdict of jury in a divorce case has the force of a verdict at law.* Under the statute either party to a divorce suit has a right to a trial by jury having all the incidents of a trial at common law, and the verdict is not merely advisory but has the same force and effect as a verdict in a suit at law, and should not be set aside unless clearly against the preponderance of evidence.

9. *SAME*—*decree for alimony may be modified as changed conditions may require.* A decree for alimony requiring the payment of a fixed sum per month for the support of the complainant and her child may be modified by the Supreme Court if the allowance is deemed excessive, and the decree as modified may be further modified from time to time by the trial court, as changed circumstances may require.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Mercer county; the Hon. EMERY C. GRAVES, Judge, presiding.

W. J. GRAHAM, and GEORGE W. WERTS, JR., for plaintiff in error.

CHURCH & CHURCH, for defendant in error.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error, Anna Louise Garrett, filed her bill for divorce March 21, 1910, in the circuit court of Mercer county against her husband, Robert Lee Garrett. The bill alleged that she was a resident of Mercer county and had conducted herself as a chaste and dutiful wife, but that her husband had been guilty of extreme and repeated cruelty and for more than two years had been a habitual drunkard.



The defendant in error answered, denying all the material allegations of the bill, and charging his wife with extreme and repeated cruelty toward him and with habitual drunkenness for more than the statutory period. The cause was submitted to a jury on the issues whether the husband had been guilty of habitual drunkenness or extreme and repeated cruelty, whether the wife had been guilty of habitual drunkenness or extreme and repeated cruelty, and whether she was a resident of Mercer county when the bill was filed. The jury returned a verdict on all issues in favor of the wife. Motion for new trial having been overruled, a decree was entered granting the wife a divorce, alimony and solicitor's fees and the custody of their only child. On appeal the Appellate Court reversed the decree on the ground that the parties were equally in fault. The case has been brought here on petition for *certiorari*.

The first question to be considered is whether the circuit court of Mercer county had jurisdiction. No cross-errors have been assigned by defendant in error, but as the question of complainant's residence in a divorce case goes to the jurisdiction of the subject matter of the suit it is open to consideration even though not raised or passed upon in the Appellate Court. (*Becklenberg v. Becklenberg*, 232 Ill. 120.) The parties to this cause had been married about seven years when the bill was filed. Defendant in error owned a farm in Mercer county, and they had resided thereon practically all the time after their marriage until a few months before the institution of this litigation. Late in the year 1909 the farm was rented until a year from the following March and the wife went to Texas to visit her parents. The husband secured a lease for a single room in a house in the village of Alexis, a mile and a half from the farm. Alexis is on the county line between Warren and Mercer counties but the leased room was in Warren county. The wife returned from Texas in February, 1910, and she, with her husband and child, remained with the tenant on

the farm for a short time and then went to the room in Alexis. The husband had removed some of his household goods to the room but had left a part of them and some farming implements on the farm with the consent of the tenant. The evidence tends to show that he intended to keep his residence on the farm and vote there because the taxes were lower than in the village, and would probably return to the farm at the end of the rental year. After stopping with her husband ten days in the village plaintiff in error went with her child to Aledo, the county seat of Mercer county, where, after consulting a solicitor, this bill was filed. Service was had upon the husband in Mercer county. The proof shows, in our judgment, that the residence of the husband at that time was in Mercer county, and his residence was the residence of the wife. The circuit court therefore had jurisdiction to hear this cause.

The Appellate Court held that the evidence justified the jury in finding that the husband had been guilty of extreme and repeated cruelty towards the wife, and that he had also been guilty of habitual drunkenness for the space of two years. No cross-errors have been assigned by defendant in error, therefore those conclusions cannot be questioned here. (*Vose v. Strong*, 144 Ill. 108; *Kantzler v. Bensinger*, 214 id. 589; *Expanded Metal Fireproofing Co. v. Boyce*, 233 id. 284.) As the charges against the wife of extreme and repeated cruelty towards her husband and habitual drunkenness must be considered in the light of his actions towards her, it is necessary to consider briefly this evidence.

At the time of the hearing in the trial court the husband was forty-six years of age and his wife twenty-six. Two children were born of the marriage,—a boy, who died when nine months old, and a little girl about three years old. The evidence is uncontradicted that the husband drank steadily from the time of the marriage up to the time of the trial. The wife testified that he was intoxicated a large part of the time after their marriage, and we think the great weight

of the testimony in this record supports her on that point. He himself admits that he was in the habit of using intoxicating liquor and sometimes drank as much as a half pint of liquor before breakfast. The preponderance of the evidence also shows that he had repeatedly used personal violence towards the wife. It stands uncontradicted in the record that her person bore marks of this violence several times during their married life. Indeed, it is not attempted to seriously controvert either that he had treated his wife with extreme and repeated cruelty or that he had been guilty of habitual drunkenness. The chief contention of defendant in error here is that the wife cannot obtain relief because she herself was equally guilty as to both charges.

It is the settled law that divorce is a remedy provided only for an innocent party, and when each party has cause for divorce against the other of the same statutory character neither can be granted a divorce; that a defendant charged with extreme and repeated cruelty may show in defense that the complainant was equally cruel. (*Dubenstein v. Dubenstein*, 171 Ill. 133.) It has, however, always been the rule in this State that while the general principles of law are the same whether the suit be instituted by the husband or the wife, in the application of these principles it is necessary to consider the relative rights which the marriage has created, the physical constitutions and temperaments of the parties, and that it must be a clear case which will induce the court to grant a divorce on the application of the husband for the cruelty of the wife. (*De La Hay v. De La Hay*, 21 Ill. 251.) It is not sufficient to show slight acts of violence on her part towards him, so long as there is no reason to suppose that he will not be able to protect himself by the exercise of his marital powers. (*Aurand v. Aurand*, 157 Ill. 321; *Dubenstein v. Dubenstein*, *supra*.) The mere violence of the wife from which the husband can easily protect himself is not cruelty. The husband may protect himself by using necessary force, but he must not

retaliate by giving blow for blow. (1 Nelson on Divorce and Separation, sec. 306, and cases cited; 9 Am. & Eng. Ency. of Law,—2d ed.—804; 14 Cyc. 602.) Bishop lays down the general rule that though the ill-conduct of the wife was such as to contribute in a measure to what she complained of in her husband, and though his ill-conduct did not reach the extreme point, still if the latter was very aggravated she might have her divorce for it. (1 Bishop on Marriage and Divorce,—5th ed.—sec. 768.) There are degrees of abuse which no provocation can justify. She may be entitled to a divorce even if she has been guilty of sudden acts of retaliation, if such acts were provoked by defendant. (1 Nelson on Marriage and Divorce, sec. 329.) In the light of these authorities we will proceed to consider the evidence which is alleged to show such misconduct on the part of the wife as to compel the court to refuse to grant her relief.

Two occasions are especially relied on as showing that the wife had treated the husband with personal violence. On one occasion she and her husband were driving in a livery rig. Defendant in error and Mrs. Westerfield were on the front seat, and plaintiff in error, her little girl and Mr. Westerfield were on the back seat. Garrett testified that he had been whipping the team and waving the whip over the horses' heads and his wife got to fussing about it and tried to take the whip out of his hands; that he and Westerfield left the carriage for a few moments, during which time his wife threw the whip away; that when he came back and took the lines the row started because she did not want him to drive so fast. From the testimony of the Westerfields it appears that Mrs. Garrett struck defendant in error in the mouth, making it bleed; that he got out of the buggy and went toward the back seat, and that she held a bottle of beer, and, using a vile epithet, told him to get in the buggy and behave himself or she would "brain" him. The wife agrees as to the cause of the diffi-

culty but says her husband called her a vile name and she slapped his face; that he came around to the side of the buggy, threatening to choke her, and she picked up a bottle and called him a "dirty, white-livered cur," and told him if he touched her she would lay him out like a dog. It is apparent from the testimony of all that the defendant in error had been drinking heavily at this time; that they were carrying liquor in the buggy and drinking; that the three who were riding with defendant in error were trying to persuade him not to whip the horses and that the women were badly frightened; that Mrs. Westerfield had taken the lines from him before the end of the row because of his actions.

The other occasion relied on was while the couple were living on the farm. The defendant in error came home in the middle of the afternoon, drunk and quarrelsome, and wanted his wife to go back to town with him, which she refused to do. She testified that she called him a "dirty coward;" that he grabbed her by the throat and spit in her face and struck her twice on the head, and that she then ran into the kitchen and seized a fire shovel, and on his following her into the kitchen she struck at him with the shovel, and as he raised his arm just at that time the shovel hit him on the side of the face; that he then threw her against the wall and across a chair; that the hired man made him stop. He claims that when his wife struck him with the coal shovel he was doing nothing in particular but had his hands folded behind his back; that she used all the force she had, and he could not see out of one eye the next morning. The hired man in question did not testify but his affidavit was admitted as evidence on the trial, in which he swore that while in his presence Garrett did nothing to his wife on the occasion when she struck him with the shovel. Garrett testified that on several other occasions his wife struck him with her fist.

Defendant in error also testified that his wife used violence towards him and called him vile names a few days before she finally left him. It appears that he insisted on getting into bed, when under the influence of liquor, with some of his clothes on, and, on her objecting, a quarrel arose which ended in a physical contest. The testimony of the husband and wife is not in accord as to just what took place, but he admits that he finally succeeded in "licking her," as he put it, admitting that he tore her petticoat off and tore her other clothes, and that she took the baby and went through the snow to a neighbor's home, where she spent the rest of the night. The uncontradicted evidence shows that she carried black and blue marks as a result of his treatment for some time thereafter, and she testified that at the time of the trial she had not entirely recovered.

As further characterizing Garrett's actions towards his wife another instance of his repeated ill-treatment should be referred to. He had a loaded revolver in the house, and she testified that being afraid, on account of certain things he had said, that he would use it, she took it from the bureau drawer and hid it under the mattress. While under the influence of liquor he found that it was gone from the bureau, and, pointing his shot-gun at her while she was in bed with the baby, told her if she did not give up the revolver he would shoot her. He testified that the gun was not loaded, while she testified that she thought it was. The revolver was loaded. She grabbed the gun, and after a little struggle he seems to have set the gun down and found the revolver under the mattress, and they struggled over that, when she finally told him if he would call one of the hired men from the barn and give the revolver to him she would let him have it. As a result he took the revolver and ejected the cartridges from it and threw it into the fire.

Before commenting further on the question of the plaintiff in error using physical violence towards her husband, it seems necessary to take up and discuss the question as to

whether she was guilty of habitual drunkenness. Cruelty, especially by the husband, seems naturally to arise from the excessive use of liquor. This court long ago said: "A sober man would scarcely dare to strike a woman, while one under the debasing influence of liquor might be guilty of any enormity." (*Coursey v. Coursey*, 60 Ill. 186.) The defendant in error testified that his wife often took a drink or two, and as a result would lie down and say she was dizzy; that she often requested him to bring home liquor, and had been in the habit of drinking ever since their marriage. One witness who testified for defendant in error states that he had lived with them for two or three years but had never seen her under the influence of liquor except on two occasions. She denied being intoxicated on either occasion, and she is corroborated as to one occasion by a disinterested witness, who also testified that he had frequently heard her refuse her husband's invitation to drink with him. Two other witnesses testified that they had seen her drink whisky a number of times, and one of them said she had on one occasion asked for a drink of beer. She testified that she first drank beer when it was prescribed for her by the physician to "make nurse" for her first baby, so that she drank it for a few weeks and then ceased its use; that her husband had often asked her to drink with him and she generally refused, but sometimes drank because she wanted to please him; that she was never intoxicated. Habitual drunkenness, as that phrase is used in our statutes, has been defined to be an irresistible habit of getting drunk; (1 Nelson on Divorce and Separation, sec. 350;) a fixed habit of drinking to excess; (1 Bishop on Marriage and Divorce, sec. 813;) an involuntary tendency to become intoxicated, which is acquired by frequent repetition,—such a frequent indulgence to excess as to show a formed habit and inability to control the appetite. (*Murphy v. People*, 90 Ill. 59; 14 Cyc. 622.) The evidence in this record shows that the wife's drinking had been brought

about and encouraged by the husband; that when she drank, it was usually because she wanted to keep him from being angry with her. One witness testified that defendant in error told him his wife did not drink but he could get witnesses to testify she did, and he had to prove that she did drink in order to beat her in the divorce suit. While the evidence is not in entire harmony on the question of her drinking, it does show conclusively, in our judgment, that she was not guilty of habitual drunkenness, as that term is used in our statute and understood in law.

Without question plaintiff in error said and did things that a wife under ordinary circumstances never should say or do to her husband, but in almost every instance in the record the evidence tends to show he had first provoked and exasperated her by his words or actions. It is very difficult to say how much ill-behavior on the part of the wife will in a given case take away her remedy. It has been said that "the criterion by which, in human tribunals, the conduct of human beings is to be estimated, should be formed, not according to the rule of ideal perfection or of occasional excellence, but according to the standard which, being attainable by the various classes to which it is to be applied, is sufficiently high to insure the preservation and promotion of the morals and good of society." (*Mayhugh v. Mayhugh*, 7 B. Mon. 424; 1 Bishop on Marriage and Divorce,—5th ed.—768.) The court, in deciding each question, must necessarily look to see which of the parties was first to blame. If the evidence shows that the acts complained of consisted mainly of resistance to ill-treatment, such acts cannot be set up to show extreme and repeated cruelty, within the meaning of the statute. (*Younge v. Younge*, 130 Ill. 230.) Under the statute either party has a right to have the divorce heard by jury, and the jury trial has all the incidents of a trial at common law, the verdict having the same force and effect, not being merely advisory, as in an ordinary chancery suit. (*Lenning v.*



*Lenning*, 176 Ill. 180; *Berg v. Berg*, 223 id. 209.) The presumption is in favor of the verdict until it is successfully impeached in some mode provided by law. (*Becker v. Becker*, 79 Ill. 532.) In this case the judge and jury saw the witnesses, heard them testify, and had vastly superior advantages for ascertaining the truth and detecting falsehood over any court sitting as a court of review. They could judge much better than this court as to the relative position and strength and the ability of the husband to protect himself against the wife. For this reason we should hesitate to disturb their verdict. We are, however, constrained to hold that this record shows that while the wife said and did things that would not tend to promote proper family relationship, she was provoked to do this by the inexcusable conduct of her husband. He practically admits that on account of his superior size and strength he was able to protect himself from injury from her. In most, if not all, instances her acts were in self-defense. The habitual drunkenness of the husband and his physical treatment of her was of a degree so gross that it is the duty of the court to interfere and grant a divorce to the wife.

The contention is also made that the decree of the trial court is erroneous as to the amount of alimony. As finally entered the decree allowed \$50 a month,—\$35 for the wife and \$15 for the child. The testimony shows that the wife had no property, and that as the child was but three years of age the wife could not seek employment and thus support herself. The evidence shows that the husband owned a farm of 170 acres, mortgaged for \$7500, and worth, according to various witnesses, from \$150 to \$225 an acre and renting at \$6 an acre. It also shows that he had a small amount of personal property, and was in debt, besides the mortgage, several thousand dollars. Under the facts in this record we are of the opinion the allowance of \$50 per month was excessive. The decree will therefore be modified by requiring the defendant in error to pay to

the plaintiff in error, for the support of herself and child, the sum of \$400 per year, in quarterly installments of \$100 each, beginning with the date of the decree. The circuit court has power to modify this decree from time to time as changed circumstances may require. *Hilliard v. Anderson*, 197 Ill. 549.

The judgment of the Appellate Court will be reversed and the decree of the circuit court, as modified, will be affirmed.

*Judgment of Appellate Court reversed.*

*Decree of circuit court modified and affirmed.*

Mr. JUSTICE COOKE took no part in the consideration or decision of this case.

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THE PEOPLE *ex rel.* William A. Milburn, County Collector,  
Appellee, *vs.* THE CAIRO, VINCENNES AND CHICAGO  
RAILWAY COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. TAXES—*total tax levied under section 1 of Hard Roads act cannot exceed one dollar on each \$100.* The total tax to be levied under section 1 of the Hard Roads act, as amended in 1909, (Laws of 1909, p. 328,) cannot exceed one dollar on each \$100 assessed valuation, and this limitation cannot be avoided by holding more than one election and authorizing the improvement of different roads at different elections.

2. SAME—*hard road tax and hard road bond tax are separate taxes.* The hard road tax authorized by section 1 of the Hard Roads act, as amended in 1909, and the tax authorized by section 4a of the same act to pay bonds issued for money borrowed to build hard roads, are separate taxes though the limitation on each tax is the same; but the fact that a tax to pay bonds might have been levied does not justify exceeding the limit fixed for the hard road tax.

APPEAL from the County Court of Wabash county; the Hon. JOHN A. LOPP, Judge, presiding.

GEORGE P. RAMSEY, (L. J. HACKNEY, of counsel,) for appellant.

H. M. PHIPPS, State's Attorney, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

An election was held in road district No. 3 in Wabash county on March 2, 1909, to vote on a proposition for macadamizing roads numbered 1 and 2, which resulted in favor of the proposition and authorized a tax of fifty-five cents on each \$100 assessed valuation of taxable property in the district for the next five years, to be expended on said roads for the specified purpose. The clerk of the district filed with the county clerk on September 15, 1909, a certificate for the levying of the tax. On March 1, 1910, another election was held in the same district to vote on the question of constructing and maintaining gravel, rock, macadam or other hard roads on three other roads of the district, numbered 3, 4 and 5, and that election resulted in favor of the proposition and for levying a tax of fifty-five cents on each \$100 of taxable property for five years, beginning with the year 1910. The clerk of the district filed with the county clerk another certificate on September 14, 1910, for the tax voted at the last election. The county collector in 1910 extended a hard road tax at the rate of \$1.10 on each \$100 assessed valuation of the property of appellant. The tax was paid except the excess of ten cents over one dollar on each \$100 of taxable property, and on the application of the county collector for judgment and order of sale for such excess the appellant objected. The court overruled the objection and rendered judgment, from which this appeal was taken.

The act authorizing the construction and maintenance of gravel, rock, macadam or other hard roads, as amended in 1909, (Laws of 1909, p. 327,) authorizes by section 1

the levying of a tax not exceeding one dollar on each \$100 assessed valuation of all the taxable property in any township in counties under township organization, or road districts in counties not under township organization, in pursuance of any election held as provided in the act. The total tax that can be levied under that section cannot exceed the rate so specified. (*People v. Cincinnati, Lafayette and Chicago Railway Co.* 247 Ill. 446.) The limitation cannot be disregarded or avoided by holding more than one election and authorizing the improvement of different roads at different elections.

Section 4a of the same act authorizes an election to determine whether the town or road district will borrow money if the commissioners desire to expend on hard roads a greater sum than is available to them from other sources, and counsel for appellee says that for aught that appears part of this tax may be for the payment of bonds. The certificate under which the tax was levied, and the tax itself, which is a single hard road tax, show the contrary. At the last election two propositions were submitted to the voters concerning borrowing the amounts stated in the propositions to construct and maintain gravel, rock, macadam or other hard roads on the same roads for which the tax had been voted, and there was a majority in favor of each proposition. That was long after the first certificate was made, which required a levy of the tax for the whole five years; (*People v. Illinois Central Railroad Co.* 237 Ill. 154;) and while it is true that there may be a tax to pay bonds and that the limitation on each tax is one dollar on each \$100 of assessed valuation of taxable property, (*People v. Cincinnati, Lafayette and Chicago Railway Co. supra*,) it does not appear that any bonds were ever issued. The hard road tax and the bond tax are separate taxes, and no tax was levied to pay bonds.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. LEO LEWINGER, Plaintiff in Error.

*Opinion filed December 21, 1911.*

**FORGERY**—*altering marginal figures of a check to correspond with written amount is not forgery.* Altering the marginal figures of a check to make them correspond with the amount expressed in written words which are not ambiguous or uncertain is not forgery, as the written words, under section 17 of the Negotiable Instrument act of 1907, control the amount of the check, and the alteration does not change the legal effect of the instrument.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. KICKHAM SCANLAN, Judge, presiding.

HENRY ROTH, for plaintiff in error.

W. H. STEAD, Attorney General, and JOHN E. W. WAYMAN, State's Attorney, (THOMAS MARSHALL, JOHN FLEMING, and F. L. FAIRBANK, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error, Leo Lewinger, was found guilty by a jury on the third count of an indictment for forgery charging him with passing as true and genuine, a false, forged and counterfeit check or order for the payment of money. The court rendered judgment on the verdict by sentencing him to the penitentiary.

The following is a copy of the material portion of the check alleged to have been forged:

"The National Bank of the Republic.

"Pay to the order of Leo Lewinger.....\$2500/00  
twenty-five hundred and no/100.....dollars."

Stamped across the face and indented through the paper so as to be read from either side were the following words and figures: "Not over \$2500\$." The evidence for

the prosecution was that the check as originally made out and delivered to Lewinger was the same as when he passed it, except that the figures after the dollar mark were "25," with two ciphers, indicating \$25; that the defendant presented the check to a saloon-keeper in its present form, with the figures changed so as to indicate \$2500; that the saloon-keeper deposited it, with other items, in the Union Bank and drew his check for \$2500, which he received and gave to the defendant.

The question in the case is whether such a change is a material alteration of a check so as to change its character and legal effect and make it a check for a different amount than the sum payable as originally drawn. The first paragraph of section 17 of the Negotiable Instrument act (Laws of 1907, p. 406,) fixes the law of this State on that subject, and is as follows: "Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount." In this check the sum payable was expressed in words and was "twenty-five hundred dollars," and the words were neither ambiguous nor uncertain, so that the sum payable was \$2500. The alteration of the figures, therefore, did not change the legal effect of the instrument. That was the law as established before the passage of the Negotiable Instrument act. The question whether the figures in a school order for the payment of money were a material part of the order arose in the case of *Langdale v. People*, 100 Ill. 263, upon an objection to the introduction in evidence of the order on account of a variance from the instrument described in the indictment. The order was for \$36, and it also bore upon its face the dollar mark and figures representing that amount. The indictment set out the order *in hæc verba* and omitted the "\$36.00." It was held that the figures were no part of the order, and the court

said: "Where the words used in the body of a note or order for the payment of money are ambiguous, so that there is uncertainty in regard to the true amount that was intended, resort may be had to the figures in the margin of the instrument for the purpose of determining the true amount agreed to be paid, as held in *Riley v. Dickens*, 19 Ill. 29, and *Corgan v. Frew*, 39 id. 31. But the figures in the margin of an instrument are not strictly a part of the contract. They cannot be reverted to to impeach the amount named in the body of the paper, and are never resorted to for any purpose unless there is uncertainty in regard to the amount written in the body of the instrument." The substance of that decision is now embodied in the Negotiable Instrument act, and as there was no uncertainty in the amount written in the body of this check, the figures as originally written could not be resorted to to change its effect or meaning. Other courts have held that an alteration of marginal figures on a check in which the amount payable is plainly expressed in words is not forgery. (*Wilson v. State*, 85 Miss. 687; *Jackson v. State*, 72 Ga. 38; *State v. Lotono*, (W. Va.) 58 S. E. Rep. 621; *State v. Means*, 47 La. Ann. 1535.) A contrary rule was adopted in *Commonwealth v. Hyde*, 94 Ky. 517, where a check was given for seventy cents, with marginal figures of "\$70/100." The figure "3" was inserted between the dollar mark and the "70/100." The Attorney General is of the opinion that the Supreme Court of West Virginia in disapproving of that decision was not correctly advised in saying that it stood alone, and he says that the same doctrine was held in *Lawless v. State*, 114 Wis. 189. The Supreme Court of Wisconsin cited the Kentucky case as a similar one, but we do not regard them as of the same nature. A check was given to George Lawless intended to be for \$9.50 for transportation to Wisconsin, and was written in this form: "Pay to George Lawless or order \$9. . . . fifty cents, . . . Dollars." When the check was presented it

had been changed by putting in the figure "5" before the figure "9," which made the check read "\$59...fifty cents," instead of "\$9...fifty cents." There the amount payable was expressed in figures and words, and the change seems to us quite different from the change of marginal figures in the Kentucky case. The most that can be said here is, that if there had been no change in the figures the party who took the check might have noticed the discrepancy and been led to make inquiry what the intention of the maker was, but the fact is that the maker of the check merely made a genuine check for a larger sum than was intended.

The judgment is reversed.

*Judgment reversed.*

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ELIZA UDEN, Appellee, vs. THOMAS PATTERSON *et al.*  
Appellants.

*Opinion filed December 21, 1911.*

1. PARTITION—*what admission by complainant does not bar a right to partition.* The admission by the complainant in a bill for partition of an allegation in the answer that at the time of the filing of the bill there was a judgment of record in the circuit court which had not been set aside, vacated or annulled, "and which judgment was an adjudication of the rights of complainant in this cause in the said real property complainant seeks to have partitioned," does not, of itself, show any bar to the relief sought.

2. SAME—*when co-tenant is entitled to demand partition notwithstanding agreement.* A co-tenant who has agreed with the others that one of their number shall be authorized to sell the real estate not later than a specified date is entitled to file a bill for partition if the land is not sold by the time agreed upon.

3. SAME—*moral wrong in refusing to be bound by verbal contract does not raise an estoppel.* Moral wrong on the part of a co-tenant in refusing to be bound by an oral contract authorizing one of the co-tenants to sell the land does not raise an estoppel against her right to demand partition after the time for making the sale has expired, notwithstanding her refusal to be so bound prevented the making of the sale within the time set by contract.



APPEAL from the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

ELMER E. ROBERTS, and H. M. KELLY, for appellants.

R. A. GREEN, and H. A. RICHOLSON, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

Appellee, Eliza Uden, filed her bill for partition in the circuit court of LaSalle county. Appellants answered her bill and filed a cross-bill. Appellee answered a part of the cross-bill and demurred to the remainder. On hearing, appellee conceded that all the facts stated in the answer of appellants to the original bill and in their cross-bill were true and correct, and no testimony was taken. The court dismissed the cross-bill, and upon the facts as admitted entered a decree for partition as prayed in the original bill. From this decree appellants have perfected this appeal.

The parties are all adults and all appeared personally in court. The bill is the ordinary bill for partition, setting up the death of the ancestor intestate, the description of the property of which he died seized, that appellee and appellants are the heirs-at-law, and praying for partition of the estate among them. The answer of appellants admitted the ownership of the real estate by the parties as tenants in common but denied that appellee was entitled to have the lands partitioned, "for the reason that at the time of the filing of said bill that a judgment had been entered in the circuit court of LaSalle county in connection with the said property, which judgment had not at any time been set aside, vacated or annulled, and which judgment was an adjudication of the rights of complainant in this cause in the said real property complainant seeks to have partitioned by her bill." The answer then sets up an agreement entered into by the tenants in common of said real estate and their

spouses on October 16, 1908, being the agreement involved in *Hartenbower v. Uden*, 242 Ill. 434. As it is there set out in full on pages 435 and 436 reference will be had to that case for its provisions. The answer then alleges that as appellant Benjamin A. Patterson made the sale provided for in the contract, and did, together with the other appellants, execute a warranty deed for the conveyance of the land to Hartenbower pursuant to said sale, and as appellee then refused to join in the execution of said deed, she is now estopped from seeking to partition the lands in question. The cross-bill, in addition to setting up the ownership of the realty and the collection and retention of the rents of said real estate by Benjamin Patterson from the death of the ancestor down to the time of the filing of the cross-bill, refers to the execution of the agreement of October 16, 1908; recites the making of a sale of the land by Benjamin Patterson under said agreement, the execution of a deed to the land by appellants and their spouses, and the refusal of appellee and her husband to execute the same; recites the filing of a bill for specific performance by Hartenbower and Benjamin Patterson against appellee, the decree of the circuit court of LaSalle county granting the relief prayed and the order of the Supreme Court reversing that decree, and prays that Benjamin Patterson be directed, under the agreement of October 16, 1908, to re-advertise the premises and make sale according to the terms of that agreement and distribute the proceeds among the tenants in common as therein provided.

Appellants contend (1) that Mrs. Uden could not maintain her bill because at the time it was filed the decree in the circuit court in the specific performance case had not been vacated, modified or set aside, because, as they claim, the remanding order of the Supreme Court had not then been filed in that case in the circuit court of LaSalle county; (2) that she is not entitled to the relief prayed because she had entered into a contract whereby it was agreed that no

partition should be made; (3) that she does not come into court with clean hands; (4) that the relief prayed for in the cross-bill should have been granted.

The answer does not in apt terms set up any former adjudication that would operate as a bar to this action. The only allegation in the answer relating to this subject is that above quoted. The cross-bill sets up the proceedings in the circuit court and the fact that the decree was reversed by this court in the case of *Hartenbower v. Uden*, *supra*. There is no allegation in the answer or cross-bill of a failure to file the mandate of this court in the *Hartenbower* case, and as there was no proof taken, this fact, if true, does not appear in the record. The allegation in the answer that a judgment had been entered in the circuit court in connection with this property and that it was an adjudication of the rights of the complainant in the said real estate did not state any matter that would operate as a bar to the filing of the bill herein, and the rights of Mrs. Uden were not affected, so far as that matter was concerned, by reason of her admission that all the facts stated in the answer and in the cross-bill were true and correct.

The contentions that appellee is not now entitled to a partition of this real estate because of the contract of October 16, 1908, and that she does not come into a court of equity with clean hands, cannot be sustained. It is true, as appellants contend, that equity will not award a partition at the suit of one in violation of his own agreement. The objection to partition in such cases is in the nature of an estoppel, (*Hill v. Reno*, 112 Ill. 154,) and that an agreement not to partition, though not expressed, would be readily implied and enforced if such implication proved necessary to secure a fulfillment of the agreement. (*Bissell v. Peirce*, 184 Ill. 60; *Ingraham v. Mariner*, 194 id. 269.) By the express terms of the agreement of October 16, 1908, Benjamin Patterson was directed to sell the real estate here sought to be partitioned not later than December 15, 1908.

The bill and cross-bill both allege, and the answer of appellants admits, that at the time the bill herein was filed, on December 27, 1909, the premises were still owned by appellee and appellants and were in the possession of Benjamin Patterson, and the cross-bill alleges that that situation still existed at the time of the filing of the cross-bill, on April 28, 1911. By the terms of said agreement the time in which Benjamin Patterson was authorized to sell the real estate expired on December 15, 1908, and the implied agreement not to partition said lands expired on that date. Benjamin Patterson having failed to make a sale of the lands before December 15, 1908, as he was directed and authorized to do by the terms of said agreement, any one of the tenants in common had the right, at any time thereafter, to file a bill for partition and secure a division of the property.

But it is urged that the refusal of appellee to execute the deed to Hartenbower at the request of Benjamin Patterson was such a fraud that she is now estopped to demand a partition of the lands. In *Hartenbower v. Uden*, *supra*, Mrs. Uden pleaded the Statute of Frauds, and it was held that she could not be required to specifically perform the parol contract entered into between Benjamin Patterson and Hartenbower. She had the right to avail herself of this defense, and in doing so she was guilty of no fraud which would operate as an estoppel to maintain the bill in this case. There must be something more than the mere moral wrong of refusing to be bound by a verbal agreement to raise such an estoppel. (*Koenig v. Dohm*, 209 Ill. 468.) "The moral wrong in refusing to be bound by a verbal agreement because it does not comply with the statute is not the fraud intended by this equitable principle. If it were, the statute would be rendered entirely nugatory." Pomeroy on Specific Performance of Contracts, 202; *Koenig v. Dohm*, *supra*.

What has been said disposes of the contention that appellants were entitled to the relief prayed in the cross-bill.

The action of the circuit court in granting the prayer of the original bill and in dismissing the cross-bill was proper, and the decree for partition is affirmed.

*Decree affirmed.*

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CHARLES C. ARNOLD, Appellee, vs. JOHN T. KEIL,  
Appellant.

*Opinion filed December 21, 1911.*

1. ELECTIONS—*when failure to make a third candidate a party to election contest petition is not fatal.* Failure to make a third candidate a party to an election contest proceeding between the two higher candidates is not fatal, where the result of the canvass shows he had no rights which would be affected by the decree.

2. SAME—*when ballots are properly preserved.* Ballots must be regarded as properly preserved even though the judges of election placed no impression on the sealing wax with which the bag containing the ballots was fastened and though the combination of the safe in which they were placed by the village clerk had not been changed since its use by the former clerk, where the village clerk carried the only key to the inner door of the safe, which he testifies was never unlocked, except by himself, after he took charge of the bag, and where he testifies that the condition of the bag is unchanged, and there is no evidence to the contrary or to show that any other person had access to the safe.

3. SAME—*unexplained pencil crosses on back of ballot constitute a distinguishing mark.* Pencil crosses on the back of a ballot must be treated as constituting a distinguishing mark where no attempt is made to explain their presence.

4. SAME—*irregular cross resembling letter T does not vitiate ballot.* The fact that the cross in the square before a candidate's name is irregularly-shaped, similar in form to the letter T, does not justify rejecting the ballot as to such candidate.

5. SAME—*writing names on blanks does not constitute distinguishing mark.* The writing of names on blank spaces in a ticket does not constitute a distinguishing mark, even though names so written in are printed on another ticket and voted for by crosses.

6. SAME—*erasure of crosses or names of candidates does not vitiate ballot.* The erasure of crosses and candidates' names by drawing pencil lines horizontally through the names or crosses, or by blackening the square where the cross was made, does not constitute a distinguishing mark or amount to mutilation of ballot.

7. SAME—*when ballot should be counted for certain candidates.* If a ballot is properly marked for a candidate for the office of president of the board of trustees it should be counted for him, even though the voter has voted for so many candidates for the office of trustee that the ballot cannot be counted for any of them.

APPEAL from the Circuit Court of Tazewell county;  
the Hon. T. N. GREEN, Judge, presiding.

GEORGE J. JOCHEM, for appellant.

J. P. ST. CERNY, (W. B. COONEY, of counsel,) for appellee.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is an election contest brought by appellee, Charles C. Arnold, in the circuit court of Tazewell county, against John T. Keil, as to the office of president of the board of trustees of the village of East Peoria. The election was held April 18, 1911. According to the returns of the judges of election and the canvass by the village board of trustees, Keil, the People's Party candidate, received 134 votes, Arnold, the democratic candidate, received 131 votes, and Edward W. Tucker, the independent candidate, 69 votes, Keil being declared elected. As a result of the contest in the circuit court a decree was entered finding that Arnold had received 142 votes, Keil 134 and Tucker 69, and that Arnold was elected. Keil thereupon prayed and was allowed an appeal to this court.

Appellant contends that the decree should be reversed because Tucker, the independent candidate, was not made a party. A demurrer filed on this ground was overruled.

Thereupon appellant answered, admitting the allegations of the petition concerning the matters alleged therein prior to the count of the ballots by the judges, but denying that the ballots were counted improperly, and also denying that they had been properly kept so as to entitle them to be introduced in evidence on a re-count. The answer also alleges that Tucker was a necessary party and had not been joined as a defendant, and that the court was without jurisdiction. After the demurrer of a party to a suit has been overruled and he has answered, he thereby waives all questions that must be raised by demurrer and can have advantage on the final hearing of the whole case only as to matters of substance, when it appears, upon a consideration of all the pleadings and the proof, that the complainant is not entitled to the relief sought. (*Kesner v. Miesch*, 204 Ill. 320.) In *Elmendorf v. Taylor*, 10 Wheat. 152, Chief Justice Marshall laid down the rule that an objection as to the want of parties does not affect the jurisdiction but addresses itself to the policy of the court; that "courts of equity require that all parties concerned in interest shall be brought before them that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself and is subject to its discretion. \* \* \* Being introduced by the court itself for the purposes of justice, it is susceptible of modification for the promotion of those purposes." (Mitford & Tyler's Pl. & Pr. in Equity, [1876] p. 18.) While it would have been better practice to have made Tucker a party, the result of the canvass showed that he was not a necessary party for the purpose of entering a proper decree. (*Brents v. Smith*, 250 Ill. 521.) Had it been shown on the hearing that Tucker received more votes than either of the other candidates for president of the board, no decree affecting his rights could have been entered as he was not made a party.

Appellant further contends that the ballots were not properly preserved after the election and should not have

been received in evidence to contradict the returns of the judges. When the ballots have been properly preserved they are the best evidence of the result of the election, but for them to control it must affirmatively appear that they have been preserved substantially in the manner required by law, by the proper officers. (*Beall v. Albert*, 159 Ill. 127; *Graham v. Peters*, 248 id. 50; *Brents v. Smith*, *supra*.) This record shows that the village clerk received the returns from the judges about ten minutes after the completion of the count; that before taking the bag of ballots from the ballot-box he called up the county judge and asked his advice as to the manner of taking care of the ballots; that he thereupon took the sealed bag of ballots from the box and placed it in a safe situated in the council chamber, on the second floor of the village hall; that access to the council chamber was comparatively easy, but that the outer door of the safe was locked by a combination and an inner door by a key. The combination had not been changed since its use by the former village clerk. The present village clerk had the only key to the inner door, and this door had never been unlocked since the ballots were placed in the safe, except by himself. He testified that the bag containing the ballots was in the same condition as when returned to him by the judges. This bag was fastened with sealing wax, but no impression was placed by the judges on the wax. No evidence of any kind was offered indicating that any other person had had access to the safe. It is insisted that it was shown on cross-examination that the village clerk did not testify positively that other persons had not had such access. A reading of his entire testimony does not uphold this claim. The trial judge saw the bag before it was opened and heard the testimony of the witnesses on this point, and stated that he thought the ballots had been preserved substantially as required by law. From this record we reach the same conclusion.



The original ballots are certified to this court with the record. There are 134 uncontested Keil ballots, 126 uncontested Arnold ballots and 69 uncontested votes for Tucker. One ballot is not marked in any way for president of the board of trustees. The 16 remaining ballots are all objected to by appellant as improperly counted for appellee.

Ballot A has three lead pencil crosses on the back. No attempt was made by the evidence to explain how these crosses came to be there. In this state of the record we are disposed to hold that they are distinguishing marks, and the ballot should not have been counted for appellee. *Brents v. Smith, supra*, (p. 529.)

It is not indicated in the brief why ballots B and C are objected to. They were properly counted for appellee.

Ballot E has an irregularly-shaped mark, similar in form to the letter T, in the square before the name of appellee. This ballot was properly counted for appellee. *Parker v. Orr*, 158 Ill. 609; *Brents v. Smith, supra*.

Ballots D, F and G are objected to on the ground that the crosses in the square before the name of Arnold are so drawn as to make them distinguishing marks. We can not so hold. They were properly counted for appellee.

Ballot H has a cross in the democratic circle and crosses in the squares before the names of Crawford and Dennis, two independent candidates for trustee, and a cross in the square before the name of Martin, People's Party candidate for police magistrate. On the democratic ticket there were only printed the names of the candidate for president and one trustee, with blank lines opposite the other two squares for trustees and the square for police magistrate. The voter who cast this ballot wrote in the democratic ticket, on the blank lines, the names of Crawford and Dennis for trustees and Martin for police magistrate. It is contended that the writing in of these names when they were already printed on the ballot and voted for by crosses, constituted

distinguishing marks. We held otherwise in *Smith v. Reid*, 223 Ill. 493. The vote was properly counted for Arnold.

In ballot I the voter made crosses in the three democratic squares for trustee, and then erased them and made crosses in the squares before three independent candidates for trustee. Under the holding of this court in *Brents v. Smith, supra*, the erasure of these crosses did not mutilate the ballot or make distinguishing marks thereon.

In ballots J, K and M the voters properly expressed their choice for Arnold for president of the board by a cross in the square before his name but voted for four candidates for trustees. While this would make it impossible to count the ballots for any candidate for trustee it would not in any way affect the vote for president, and the three ballots should be counted for Arnold.

In ballots L, N, O and P it is objected that each of the ballots has a distinguishing mark, because the voters in two cases crossed out the name of a candidate by lead pencil marks drawn once or twice horizontally through the name, and in two cases marked out a cross, once by parallel lines and once by filling in the square with pencil marks. These erasures are not as to president of the board. In all four ballots a cross is properly placed in the square before the name of Arnold. We have held that such erasures do not mutilate the ballot or constitute distinguishing marks. *Brents v. Smith, supra*; *Kerr v. Flewelling*, 235 Ill. 326; *Winn v. Blackman*, 229 id. 198.

Adding to the 126 uncontested Arnold votes the 15 contested ballots that we have counted for him gives him 141 votes, or seven more than the 134 that it is agreed were properly counted for appellee, Keil. Arnold was therefore properly declared by the trial court to be elected.

The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

LOUIS WEBER & Co. Defendant in Error, vs. JACOB M.  
LEVINE, Plaintiff in Error.

*Opinion filed December 21, 1911.*

APPEALS AND ERRORS—*when constitutionality of section 33 of Municipal Court act is not involved.* The constitutionality of section 33 of the Municipal Court act, providing that any party may be examined by the adverse party as if under cross-examination but that the party calling for the examination shall not be concluded thereby but may rebut the testimony, is not involved, even though the plaintiff calls the defendant as a witness under said section and the court refuses to hold said section unconstitutional, where the plaintiff accepted the defendant's testimony as true and made no attempt to contradict it.

WRIT OF ERROR to the Municipal Court of Chicago;  
the Hon. HOSEA W. WELLS, Judge, presiding.

LOUIS GREENBERG, for plaintiff in error.

BLUM & BLUM, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court :

The defendant in error, a corporation, recovered in the municipal court of Chicago a judgment in trover against the plaintiff in error, a pawnbroker, for the value of a diamond ring pawned to the plaintiff in error upon which the defendant in error claimed to have a chattel mortgage. A writ of error was sued out of this court on the ground that the constitutionality of section 33 of the Municipal Court act is involved. A motion made by the defendant in error to dismiss the writ for the reason that no constitutional question was involved was taken with the case.

We are of the opinion that we are without jurisdiction in this case. Section 33 of the Municipal Court act provides that any party to a suit in the municipal court may be examined on the trial as if under cross-examination at

the instance of the adverse party, but that the party calling for such examination shall not be concluded thereby but may rebut the testimony thus given. On the trial the plaintiff called the defendant as a witness, stating that he called him under section 33. The defendant's counsel then said that he claimed that if the defendant was called under section 33 any testimony he might give would bind the plaintiff, to which the court responded that the plaintiff was not bound by any testimony given by the defendant, and the defendant excepted. The defendant then testified that he was a pawnbroker, and that a certain diamond ring was pawned to him at his place of business on a certain date by A. A. Hartman, and that he did not know whether the plaintiff had a mortgage on it or not. The court refused to hold a proposition of law submitted by the defendant to the effect that section 33 was unconstitutional, that the plaintiff was bound by any testimony given by the defendant when called by the plaintiff, and that the defendant's testimony must be treated the same as that of any other credible witness testifying on behalf of the plaintiff. No attempt was made to contradict the defendant's testimony. In fact, every material part of it was essential to the plaintiff's case, and if it had not been accepted as true no judgment could have been rendered against defendant. There was therefore no occasion for the application of section 33. It was absolutely unimportant.

No constitutional question being presented we have no authority to examine the other matters assigned for error.

In accordance with the statute the cause will be transferred to the Appellate Court for the First District.

*Cause transferred.*

THE MOLINE WATER POWER COMPANY, Appellant, vs.  
PLEASANT F. COX, County Treasurer, et al. Appellees.

*Opinion filed December 21, 1911.*

1. **REAL PROPERTY**—*what amounts to a grant of the fee simple.* A grant by a water power company to the United States of "the unrestricted use in perpetuity, without charge, of so much of the bed of the river not already belonging to the United States as may be covered by the pool and wall, necessary to develop the water power, and ten feet outside of the said wall," is a grant of the fee simple.

2. **SAME**—*right to use water power is an interest in real estate.* The use of a fall of water artificially impounded is the taking of that which has been produced by the combination of artificial means and natural forces and partakes of the nature of a *profit à prendre*, and the right to such use is an interest in the aggregate of rights constituting the water power, which is real estate.

3. **TAXES**—*State laws concerning taxation do not apply where the United States has exclusive jurisdiction.* The laws of Illinois concerning taxation have no application to places over which Congress has the exclusive power of legislation in all matters.

4. **SAME**—*when right to water power is exempt from taxation.* The right to water power, which is an interest in real estate, is exempt from taxation where the situs of such power is a place which has been acquired by the United States and over which Congress has the exclusive power of legislation.

5. **SAME**—*equity will enjoin the collection of tax upon exempt property.* A court of equity will enjoin the collection of a tax upon property which is exempt from taxation.

6. **SAME**—*when assessment of franchise of corporation by local assessor is void.* A corporation having the power, in addition to manufacturing, to own real estate and water power and to lease or sell water power to others for manufacturing purposes, is not of the class of corporations whose franchises may be assessed by the local assessor, and an assessment of the franchise of such corporation by the local assessor is void and the collection of the tax based thereon may be enjoined.

7. **SAME**—*a person charged with tax on property he does not own may enjoin collection of tax.* A person is not bound to anticipate that the assessor will assess property to him which he does not own, and if such assessment is made without his knowl-

edge he has a right to enjoin the collection of the tax and is not limited to a remedy before the board of review.

8. *SAME*—*assessor not bound by items or valuation in unsworn schedule.* The assessor is not bound by the items or valuations appearing in an unsworn schedule given to him by the president of a corporation, and the fact that the assessor may subsequently complete the assessment by adding property of the corporation omitted therefrom is a matter of which the corporation is bound to take notice.

HAND and VICKERS, JJ., dissenting.

APPEAL from the Circuit Court of Rock Island county;  
the Hon. WILLIAM H. GEST, Judge, presiding.

PEEK & DIETZ, and WILLIAM A. MEESE, (ALBERT M. KALES, of counsel,) for appellant.

L. M. MAGILL, State's Attorney, (W. R. MOORE, of counsel,) for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The Moline Water Power Company began a suit in the circuit court of Rock Island county to enjoin the collection of certain taxes extended against it, and the court having sustained a demurrer and dismissed the bill for want of equity it has appealed.

From the averments of the bill it appears that the appellant is a corporation created by a special act of the legislature in force February 16, 1865, and authorized to own real estate and a part or all of the water power at Moline, to carry on such manufacturing business as it may desire, and to lease or sell water power or lands to others for that purpose; that on April 1, 1909, it owned certain real estate along the south side of the slough of the Mississippi river separating the island of Rock Island from the mainland, and also other lands, upon which taxes had been levied for many years and all the taxes assessed against said real estate have been paid; that appellant's other property

consisted of manufacturer's tools, implements and machinery of the value of \$15,000, office furniture of the value of \$50, and \$1325 cash, besides a right to receive one-fourth of all the water power developed by the United States in the slough of the Mississippi river lying between the island of Rock Island and the Illinois mainland, by virtue of a writing executed by the appellant and the Secretary of War of the United States, and the appellant owned no other property; that by its president it made out and delivered to the assessor a schedule of the items of property mentioned, for taxation, which was accepted by the assessor without any question as to such items or their value, and that the tax on the amount of said items is \$291.48, which has been tendered both to the town collector and the county collector, but they have refused to accept said payment; that the assessor, secretly and without notice to the appellant, raised the valuation of the item "manufacturer's tools, implements and machinery" from \$15,000 to \$35,000, and added to the schedule the following items: "Building on dam, investments in real estate and imp. thereon, (see sec. 10,) \$23,625; all other personal property required to be listed, \$140,000;" that the action of the assessor was without the knowledge of the appellant, and that it never had any notice thereof until February 25, 1910, when one of its officers went to the office of the town collector and then first learned of the changes made in the schedule, and that the amount of personal taxes charged against the appellant had thereby been increased to \$3560.

It is averred that the increase of \$20,000 in the valuation of "manufacturer's tools, implements and machinery" was brought about by including therein machinery which did not belong to and was neither used by nor in the possession or control of the appellant, being three generators and two exciters, which were on April 1, 1909, the property of the People's Power Company and were in its possession and control; that the item "building on dam," etc.,

referred to a power house built upon a dam, the property of the United States; and that the item "all other personal property required to be listed, \$140,000," represents the value of the appellant's alleged water power which it enjoys under a contract with the United States, ascertained by determining the capital sum which at five per cent will produce the income estimated to be received from the use of the water power, and in addition thereto the intangible property of the appellant represented by its franchise to be a corporation and the good will of its business.

The bill sets forth, in detail, the origin and nature of the appellant's right to use the water power, substantially as follows: Between the island of Rock Island and the mainland is a slough or narrow channel of the Mississippi river having sufficient fall for the development of a water power. In 1865 the appellant became the owner of the land on the south side of the slough and the south half of the bed of the slough, and of the right to erect and maintain a dam across the slough and to attach it to the north shore, and did maintain a dam across the slough and develop a water power. In 1862 provision was made by an act of Congress for the establishment of a national arsenal on Rock Island, and in 1864 an act was passed providing for the acquisition of all adverse claims to any part of the island. In 1866 an appropriation of \$100,000 was made for securing the water power. In that same year the Secretary of War took possession of the whole of the island and the whole of the water power, and they have ever since been held by the United States as a military reservation, for a national arsenal. Under the act of Congress awards were made by commissioners appointed pursuant to its provisions, of the sums to be paid adverse claimants to different parts of the island, which were accepted and paid, but no award was made as to the water power of the appellant. In regard to the water power the commissioners reported that they had negotiated for a transfer of the en-



tire water power from the appellant to the United States, and had agreed upon a basis for the settlement of all questions pending between the appellant and the United States, the adoption of which by the war department was recommended. The basis agreed upon was as follows:

*"First*—The Moline Water Power Company to convey to the United States the fee of the entire Moline water power, and also to grant to the United States the unrestricted use in perpetuity, without charge, of so much of the bed of the river not already belonging to the United States as may be covered by the pool and wall, necessary to develop the water power, and ten feet outside of said wall, together with the right of access thereto from the Illinois shore at all times, for the purpose of constructing or repairing said wall.

*"Second*—The government to develop and maintain the power, so far as it can be done with the money heretofore appropriated and that which may hereafter be appropriated by Congress for that purpose.

*"Third*—The Moline Water Power Company to have the use in perpetuity, free from all charge for rent or repairs, of one-fourth of the entire water power developed, and also the right to rent for a specified time, at the rate of fifty cents per annum per square inch of water power, measured by the openings of water wheels, so much additional power as the ordnance department may deem expedient. And further, that the company, its lessees or assigns, shall have the right to place their wheels upon the ten feet outside the wall, provided that the foundation of said wall shall not thereby be disturbed nor the stability of the wall thereby endangered; and also, further, that this granting to the United States of the unrestricted use of the pool, the wall and the ten feet outside the wall shall not be so construed as in any manner to operate as a bar to the free use and occupancy by the company, its lessees or assigns, of the same premises for all purposes connected

with and incidental to the use of their portion of the water power or such as may be leased by them, and such use shall not interfere with or obstruct the United States in the free use of its portion of the water power.

*"Fourth*—The works to be built by the government for the development of the power to be so arranged as to give the company the free use of all the power herein contemplated to be used by the company, both as to the use of the fourth part, so far as may be practicable without impairing the power in use by the government to a disproportionate extent, and also to the proposed power to be leased. The openings in the dams intended for the use of the company to be of such size and in such position as the company may elect.

*"Fifth*—Sixty thousand dollars of the present appropriation to be applied to the extension of the present stone dam on the Moline side, and \$40,000 to the extension and repairs of the wing dam and removal of such deposits as may be required for the extension and repairs of said wing dam. The use of the present water power shall not be unnecessarily obstructed during the construction of the proposed work, nor shall any rent be required until the improvement contemplated by the \$100,000 appropriation shall have been made.

*"Sixth*—It is also further understood that neither occupant of the above water power shall have the right to, nor shall allow others to, obstruct either pool or waterway by sawdust or bark or other substances, to the detriment of the water power or the sanitary condition of the vicinity."

By a joint resolution of Congress the Secretary of War was authorized to carry into effect the recommendation of the commissioners in relation to the water power, and pursuant to such authority an agreement was entered into in the summer of 1867 between the United States and the appellant which provided as follows:

*"First—*The Moline Water Power Company, for the considerations hereinafter mentioned, hereby conveys in fee to the United States of America their entire water power, with the free and unrestricted use by the said United States of so much of the bed of the Mississippi river as may be required for the further development of said water power, which development, together with the maintenance of that power, is to be done by the United States out of the appropriation applicable to those purposes, and of any future appropriations that may be made applicable to the same.

*"Second—*The United States of America hereby grants to the Moline Water Power Company the right of the free use of one-fourth of the entire water power above conveyed, and the privilege of renting for a specified time, at the rate of fifty cents per annum per square inch, so much additional water power as the Secretary of War may deem it expedient to authorize to be rented; and also agrees to arrange the government works for developing the water power in such a manner as to enable the Moline Water Power Company to avail itself of the right and privilege above mentioned.

*"Third—*The United States of America hereby agrees to apply \$40,000, or so much thereof as the war department may consider necessary, to complete the wing dam, and the residue of the appropriation of \$100,000 to the dam on the Moline side; and further, not to obstruct unnecessarily the use of the present water power during the execution of the work above stated, nor to require the payment of any rent until the improvement contemplated thereby shall have been made, so far as the expenditure of the \$100,000 will permit.

*"Fourth—*It is mutually agreed between the Moline Water Power Company and the United States of America that neither of them shall at any time make any obstruction of the water power as now existing or hereafter to be developed. It being further understood that this agree-

ment is for the purpose of carrying out the recommendation of the commissioners appointed under the acts of April 19, 1864, and June 27, 1866, relative to the Moline Water Power Company and water power at Rock Island, Illinois, and that the recommendation of said commissioners now on file in the war department at Washington City is regarded as part of this agreement."

A supplementary agreement, not material to be here set out, was afterward entered into, and under these agreements the United States has constructed dams, and has been continuously in the exclusive possession and control of the dams, the bed of the slough and the entire water power, subject only to the obligation to permit the appellant to have the use of one-fourth of the water power developed, and the possession and control of the said dams, slough and water power are necessary to the United States for the carrying on of its work at said arsenal. The appellant has never used the power itself, but has taken it at the dam and transmitted it to others whom it has permitted, for hire, to use it.

The assessment was made of the water power right as personal property. The cause has been argued by both parties on the theory that it is personal property, though the appellant insists that if it is an interest in real estate it is still exempt from taxation. In our judgment the appellant's right to use the water power must be regarded as an interest in real estate. It is not strictly an easement, which is a privilege, without profit, which the owner of one tenement has in that of another, by which the latter is obliged to suffer something or to refrain from doing something on his own land for the advantage of the former. (Gale on Easements, 8.) A dominant as well as a servient estate is essential to an easement. While appellant was the owner of land adjacent to the dam, it is manifest that the water power was not granted as appurtenant to this land. The bill avers that the appellant never did use the power on its

own land, but, with the acquiescence and approval of the United States from the beginning, contracted for the use, for hire, of said power by various persons and corporations owning manufacturing plants on the shore; that it had so used the power before the transfer to the United States and continued to do so afterward. There is no indication that any change in the appellant's method of conducting its business was anticipated or that it was intended to restrict the use of the power to the land which the appellant then owned, as would have resulted if the power had been appurtenant to that land. The right to use the water power was not granted to be exercised only in connection with the occupancy of the appellant's lands. There was therefore no dominant estate, but the burden imposed upon the entire water power was in favor, not of any particular land, but of the appellant. Rights of this sort, which one may exercise in another's land without regard to the occupancy of any land in connection with which the use exists, are sometimes called easements in gross or rights in gross. Such a right is ordinarily a mere personal right in the land of another which is neither assignable nor inheritable. (*Garrison v. Rudd*, 19 Ill. 558.) The right to enter upon land and take away a part of the soil or its produce, as to cut grass, to pasture the land, to take gravel or minerals, is not an easement, which is by its definition without profit, but is called a *profit à prendre*, and though in gross may be inheritable and assignable. It is really an interest in the land itself. (*Post v. Pearsall*, 22 Wend. 425; *Cadwalader v. Bailey*, 17 R. I. 495.) Running water is not the subject of property, (*Druley v. Adam*, 102 Ill. 177,) and therefore the right to enter upon another's land and take water from a natural spring or stream is an easement, but the right to take it from cisterns or wells, where it has been artificially produced, is a *profit à prendre*. (*Hill v. Lord*, 48 Me. 83; *Race v. Ward*, 4 E. & B. 702.) The head of water raised by damming a stream and impounding the

water is not power, but it is the source of power and is produced artificially. Power is not a chattel. It is not a tangible entity. It manifests itself only by its results. It is merely a source of mechanical energy. But it is property, and is bought and sold in the market as freely as the products of the farm. At common law it could not be the subject of larceny, which must be of goods and chattels, but it is now protected by statute to the same extent as other forms of property, and the unauthorized connection of any gas, water or electric current with a motor or other appliance is a misdemeanor, punishable by law. (Crim. Code, par. 117.) The use of a fall of water artificially impounded is the taking of that which has been produced by the combination of artificial means and natural forces, and partakes of the nature of a *profit à prendre*. It is, in fact, an interest in the aggregate of rights constituting the water power, which is real estate.

It is insisted on behalf of the appellant that if its interest is to be regarded as real estate it is exempt from taxation because it is an interest in land belonging to the United States. By section 8 of article 1 of the constitution of the United States it is provided that "the Congress shall have power \* \* \* to exercise exclusive legislation in all cases whatsoever over \* \* \* all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings." By an act of the legislature in force April 1, 1867, (Laws of 1867, p. 175,) the State ceded to the United States jurisdiction over the island of Rock Island, Benham's, Wilson's and Winnebago islands, and their shores, taken and assigned by the United States for an arsenal and armory. On December 14, 1871, another act was passed, section 2 of which provided that the United States may enter upon and occupy any land which may have been or may be purchased or condemned or otherwise acquired, and shall have the

right of exclusive legislation and concurrent jurisdiction, together with the State of Illinois, over such land and the structures thereon, and shall hold the same exempt from all State, county and municipal taxation. (Hurd's Stat. 1909, p. 2255.) By these acts the State signified its consent to the acquisition by the United States of the land and water power for the arsenal. Thereupon, by the constitution of the United States as well as by the act of the legislature, Congress became vested with the power to exercise exclusive legislation, in all cases whatsoever, over the places so acquired. If Congress had exclusive legislation over those places, then the legislation of Illinois in regard to taxation had no application to them.

Prior to the negotiations with the United States the appellant was the owner of land on the south side of the slough, the south half of the bed of the slough, the dam, and the right to attach the dam to the north shore. By the agreement in pursuance of the negotiations it conveyed to the United States the entire water power in fee, including the bed of the slough, the dam and ten feet outside of it. When it conveyed "the unrestricted use in perpetuity, without charge, of so much of the bed of the river not already belonging to the United States as may be covered by the pool and wall, necessary to develop the water power, and ten feet outside of said wall," nothing remained to the grantor. A grant of the unrestricted use of real estate in perpetuity, without charge, is a grant of the fee simple. The interest of the appellant thereafter was its interest in the water power granted to it by the United States. This was an interest in the real estate. Its situs was the place which had been acquired by the United States. Over that place the tax laws of Illinois did not reach, for Congress had there the exclusive power of legislation. Equity will enjoin the collection of a tax upon property exempt from taxation. *Siegfried v. Raymond*, 190 Ill. 424.

The appellant's interest in the water power was real estate and was exempt from taxation. It was assessed as personalty, along with the franchise and good will of the appellant, by the local assessor. Section 3 of the Revenue act requires the franchises of all corporations created under the laws of this State, except those organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for the publishing of newspapers, or for the improving and breeding of stock, to be valued by the State Board of Equalization and not by the local assessor. That the appellant is not one of the excepted corporations appears from the powers granted by its charter, which are, besides manufacturing, to own real estate and part or all of the water power at Moline, and to lease or sell water power to others for manufacturing purposes. (*Evanston Illuminating Co. v. Kochersperger*, 175 Ill. 26.) An assessment of the appellant's franchise by the local assessor would therefore be void and the collection of a tax extended on such assessment would be enjoined. *Chicago and Milwaukee Electric Railway Co. v. Vollman*, 213 Ill. 609.

In regard to the assessment of "manufacturer's tools," etc., the averment of the bill is that the assessment in excess of \$15,000 arose from the assessment of three generators and two exciters which were not the property of the appellant. A tax extended against a person upon an assessment of property which he does not own is illegal and levied without authority of law, and its collection will be enjoined. (*Irvin v. New Orleans*, *St. Louis and Chicago Railroad Co.* 94 Ill. 105; *Searing v. Hearysides*, 106 id. 85.) It is said that the appellant, if not satisfied with the assessment, should have appeared before the board of review and had it corrected. The complaint, however, is not about the valuation of its property. With that the complainant is satisfied and it has tendered the tax due thereon. It was bound to know that its property would be



assessed and to ascertain the amount, and it had its remedy before the board of review if not satisfied. It was not bound to anticipate that the assessor would assess to it property owned by another person. Such assessment made without the appellant's knowledge was void, and it was not limited to a remedy before the board of review.

In regard to the building on the dam, the averment is that the appellant, with the consent and permission of the United States, has built upon and annexed to and made a part of said dam a substantial brick power house, in which is contained machinery for the generation of electrical current. The terms of the agreement by virtue of which such permission was granted are not set out, and it does not clearly appear that the power house and machinery therein may not be personal property having its situs at the residence of the owner, and as to this item the bill was not sufficient to entitle the appellant to relief. It is said that this item was added secretly and without the knowledge of the appellant by the assessor after he had accepted the appellant's schedule. All that appears from the bill with reference to this is, that the appellant's president made out a schedule, which was not sworn to, and delivered it to the assessor, who took it. No other act of the assessor is shown. He was in no way bound by the items or valuations stated in the schedule. He did not insert the items, fix the valuations, agree to them or even at the time know what they were, so far as the averment of the bill goes. He did nothing to deceive the appellant, and his act in subsequently completing the assessment was one of which the appellant was bound to take notice.

As to the water power, which was not subject to taxation, and the franchise and good will, the assessment of which by the local assessor was void, the two constituting the item "all other property required to be listed," and as to the amount of \$20,000 in the item "manufacturer's tools," etc., upon the generators and exciters not owned by

the appellant, the amended bill was sufficient to entitle the appellant to an injunction.

The decree is reversed and the cause remanded to the circuit court, with directions to overrule the demurrer to the amended bill.

*Reversed and remanded, with directions.*

HAND and VICKERS, JJ., dissenting.

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THE WHITE SEWING MACHINE COMPANY, Appellant, vs.  
NORMAN M. HARRIS *et al.* Appellees.

*Opinion filed December 21, 1911.*

1. STATUTES—*effect of an express repeal and re-enactment of statute at same time.* Where there is an express repeal of a statute and a re-enactment of all or a portion of it at the same time, the re-enactment neutralizes the repeal so far as the provisions of the old law are unchanged in form or substance; and offices are not lost, statutory rights are not defeated, statutory powers are not taken away or criminal charges affected by the repeal and re-enactment of the provisions upon which such matters, respectively, depend.

2. SAME—*statute will ordinarily be given a prospective operation, only.* A statute should be given a prospective operation unless there is language found therein which is so clear that it will admit of no other construction than that the act is to be given retrospective operation.

3. CORPORATIONS—*licensed foreign corporation not required to re-qualify under act of 1905.* The act of 1905, concerning foreign corporations, (Laws of 1905, p. 124,) was intended as a continuation of the main features of the act of 1897 as revised in 1899, (Laws of 1899, p. 118,) and it was not intended by the act of 1905 that foreign corporations already licensed under the act of 1897 to do business in the State should re-qualify and pay again the license fees they have already paid for that purpose.

4. SAME—*new requirements added by the act of 1905 apply to corporations previously doing business in the State.* The requirements added by the act of 1905, concerning foreign corporations, apply to the corporations doing business in the State previous to the enactment of such law.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Pulaski county; the Hon. A. W. LEWIS, Judge, presiding.

WALL & MARTIN, for appellant.

CHARLES L. RICE, and C. S. MILLER, for appellees.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

The White Sewing Machine Company, appellant, sued appellees in debt on a bond, in the circuit court of Pulaski county. By special plea the appellees alleged that appellant was a corporation for profit, organized in the State of Ohio, and had failed to comply with the provisions of the Illinois act as to foreign corporations in force July 1, 1905; that said bond was executed to secure the purchase price of goods sold since July 1, 1905. Appellant, by replication, alleged that it had procured, on September 10, 1897, a license under the law then in force, to do business. A general demurrer was sustained to this replication and judgment entered in favor of appellees. Appellant elected to stand by its replication and appealed to the Appellate Court, where the judgment of the lower court was affirmed by a divided court. A certificate of importance was thereupon issued, and this appeal followed.

The act in force July 1, 1897, (Laws of 1897, p. 174,) with reference to foreign corporations, under which appellant obtained its charter and was licensed to do business in this State, was re-passed as a revised act, amended only in a few unimportant particulars, by the act in force July, 1899. (Laws of 1899, p. 118.) It is conceded by all parties that that act applied to appellant after its passage but did not require it to re-qualify. The sole question at issue here is whether the legislature required, by the act of 1905,

(Laws of 1905, p. 124,) that all foreign corporations, other than those especially excepted, should be required to re-qualify thereunder before they could legally do business in this State. It is not claimed that appellant is one of the class of corporations specifically excepted.

In ascertaining the legislative intent it is necessary to compare the provisions of the act of 1897, as revised in 1899, with those of the act of 1905. Without attempting to set forth, in detail, all the requirements of either act, we will state some of the main features of the two acts that in our judgment are substantially alike, and some of the features of the new act that are not found in the original act as amended. In order to do this we shall compare the law of 1905 with the revised law of 1899.

Section 1 of the latest act has a provision that all foreign corporations for profit, excepting ones not here involved, shall be required to comply with the provisions of this act and be subject to all the regulations prescribed therein, as well as all other regulations, limitations and restrictions applying to corporations of like character organized under the laws of this State. Substantially the same provision, with a little added detail, is found in section 3 of said act of 1905. These provisions, in substance but without many details, are found in the first part of section 2 of the act of 1899. Section 2 of the act of 1905 provides that the "president and secretary" shall make a sworn statement to the Secretary of State as to the character and certain details of the business. In the first part of section 3 of the act of 1899 somewhat the same provision is found, although the details of the requirements are not so fully set out, and the sworn statement is not to be made by both the president and secretary, but by the "president, secretary or any officer." Following the provision above referred to in said section 2 of the act of 1905 is found a provision that the statement required to be filed by the president and secretary shall contain the name and ad-

dress of some attorney in fact upon whom service can be had in all suits commenced in this State. We find a like provision in the first part of section 2 of the act of 1899, except that it there states that the corporation shall designate some person as its agent or representative in this State on whom service of legal process may be had. Again, in section 2 of the act of 1905 we find a requirement that the articles of incorporation, etc., duly authenticated, shall be filed with the Secretary of State. Substantially this same requirement is found in the first part of section 3 of the act of 1899. In the last part of section 2 of the act of 1905 is found the requirement as to the Secretary of State issuing a license to a foreign corporation authorizing it to do business in this State. A similar provision is found in section 3 of the law of 1899, except that the laws of 1899 and of 1897 provide that the length of time shall not be greater than contemplated by the laws of this State. The first part of section 3 of the act of 1905 requires every foreign corporation to keep on file with the Secretary of State an affidavit of the president and secretary showing the location of its principal place of business and of its attorney for receiving and accepting service, etc. A similar provision is found in the law of 1899 in the latter part of section 3, although here, again, the details are not so fully set out as in the later law. In the latter part of section 3 of the act of 1905 is a provision with reference to foreign corporations owning and holding real estate in this State. A provision in almost the same language is found in section 2 of the law of 1899. The last part of section 3 of the law of 1905 provides for the payment of fees by the foreign corporation to the Secretary of State. The same provision is found in nearly identical language in section 3 of the law of 1899. Both of these laws require the same fees. Section 4 of the law of 1905 has certain provisions with reference to building and loan and insurance companies. Briefer provisions are found on the same subject in

the latter part of section 3 of the law of 1899. Section 6 of the law of 1905 provides the penalty for failure to follow the provisions of the act, and closes with the provision that "if after this act shall take effect, any foreign corporation shall fail to comply herewith, no suit may be maintained either at law or in equity upon any claim, legal or equitable, whether arising out of contract or tort in any court in this State." Section 4 of the law of 1899 is practically the same in substance and very similar in wording, although the later law provides a larger penalty and authorizes the Attorney General, as well as the State's attorney, to prosecute. Section 7 of the law of 1905 has reference to this act not repealing any act regulating the admission of any insurance, surety, building and loan, railroad or telegraph corporation, somewhat similar provisions being found in the latter part of section 3 of the law of 1899.

We will now call attention to some of the provisions found in the new act which are not in the former acts.

In the latter half of section 2 of the act of 1905 is a provision that the Secretary of State shall have power to prescribe the form of the application for license, and may, in addition, propound interrogatories to the applicants respecting the character of the business, the amount of capital stock and the proportion of its business in this and other States and territories, the answers to such interrogatories to be filed with the application. Section 5 of the act of 1905 provides that the Secretary of State may, in his discretion, at any time, prepare and propound to the officers of any foreign corporation doing business here, interrogatories respecting the character of the business, location, names and residences of directors and amount and disposition of capital stock, to be answered within five days after the receipt thereof, and for the revocation of the authority to do business upon the failure or refusal to answer such interrogatories. Section 8 of the law of 1905 provides that the act

of 1897, as amended in 1899, "is hereby repealed and all acts and parts of acts in conflict herewith to the extent only of such conflict are hereby repealed." Section 9 of the act of 1905 provides that the act shall not be applicable to any railroad corporation.

While there may be some minor matters in the act of 1905 that are not referred to, directly or indirectly, in the former acts, we think we have stated the principal points of resemblance and difference. Manifestly, the two acts are, with one or two exceptions, very much alike in their requirements. The chief exception is the provision in the later act requiring additional information as to the character, officers, capital stock, etc., of the corporation, either at the time of its application or at any time thereafter, and that for revocation of the license on failure to comply with the request of the Secretary of State in that regard. This analysis of the two acts leads almost necessarily to the conclusion that the legislature did not intend by the later act to provide that all foreign corporations included within the operation of the earlier acts should re-qualify and pay another license fee before they could do business in the State.

When there is an express repeal of a statute and a re-enactment of all or a portion of it at the same time, the re-enactment neutralizes the repeal so far as the provisions of the old law are contained in the new one. As to the portion unchanged in form or substance, the amendatory act is a mere continuation of the original act. (*People v. Zito*, 237 Ill. 434; 1 Lewis' Sutherland on Stat. Const.—2d ed.—sec. 238; *Haspel v. O'Brien*, 11 Ann. Cas. (Pa. St.) 470, and notes; *Baker v. Shinkle*, 249 Ill. 154.) Offices are not lost, (*State v. Baldwin*, 45 Conn. 134,) statutory rights are not defeated, (*Capron v. Strout*, 11 Nev. 304,) statutory powers are not taken away (*Middleton v. N. J. W. L. R. R. Co.* 26 N. J. Eq. 269,) or criminal charges affected (*State v. Gumber*, 37 Wis. 298,) by such repeal and re-enactment of the law on which they, respectively, depend. It has been

held by the Supreme Court of Massachusetts that the repeal of a general incorporation law by a statute substantially re-enacting its provisions does not terminate the existence of the corporations organized under it. *United Hebrew Benevolent Ass'n v. Benshimol*, 130 Mass. 325.

The general rule to be applied in the construction of statutes is, that they should be given a prospective rather than a retrospective or retroactive operation unless there is language found in the statute which is so clear that it will admit of no other than the retroactive construction. (*People v. Lower*, 236 Ill. 608, and cases cited; 2 Lewis' Sutherland on Stat. Const.—2d ed.—sec. 642.) There is nothing in the act of 1905 that states specifically that this act shall apply to foreign corporations already licensed under the previous act. On the contrary, comparing this act on this point with the provisions of the acts of 1899 and 1897, it seems quite clear that the legislature did not so intend. The earlier acts provided, in terms, that every foreign corporation, "before it shall be authorized or permitted to transact business in this State, or to continue to do business therein, if already established, shall," etc. There is no provision in the law of 1905 as to corporations "continuing to do business" in this State. The legislature, by leaving this provision out of the new act, manifestly intended to treat the foreign corporations already doing business in a manner different than the former acts treated foreign corporations then doing business. If such a provision had been included in the act of 1905, no doubt could exist that it was the intention to make this act retrospective. In our judgment the legislature by the act of 1905 intended that it should be a mere continuance of the main features of the former act, with some modifications as to details, which would not require foreign corporations already doing business in the State to re-qualify or pay again the license fee already paid before they could do business in the State.



Appellant, by its license issued under the act of 1897, was authorized to bring this suit.

Without attempting to discuss the added requirements of the law of 1905, we deem it proper to state that they plainly apply to the corporations doing business in the State previous to the enactment of the later law, for the law of 1899 provided, as we have seen, that the foreign corporations, when licensed, should be subjected to all liabilities, restrictions and duties which might be imposed upon corporations of like character organized under the general laws of this State and should have no other or greater powers. Then, too, sections 9 and 26 of the general Incorporation act (Hurd's Stat. 1909, pp. 560, 562,) specifically provide that the charters of all corporations shall be subject to such changed regulations as may be deemed advisable by the legislature.

The conclusions reached render it unnecessary to consider whether, if the legislature had attempted to require the license fees to be again paid and new licenses taken out before foreign corporations doing business under the former laws could continue in business, such an act would interfere with the contract rights of the appellant under the reasoning of *American Smelting and Refining Co. v. Lindsay*, 204 U. S. 103, or whether such a provision in the law would be simply additional regulations of such corporations which could be enforced by the State authorities under the holding in *Hammond Packing Co. v. State*, 212 U. S. 322.

The judgments of the Appellate Court and of the circuit court of Pulaski county will be reversed and the cause remanded to said circuit court for further proceedings in harmony with the views herein expressed.

*Reversed and remanded.*

## ELLA ANSON, Appellee, vs. THE NEW YORK LIFE INSURANCE COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. INSURANCE—*doubtful provisions of policy construed most favorably for the insured.* In construing provisions of an insurance policy regard must be had to the object and purpose which were intended by the contracting parties, and doubtful provisions are to be construed most favorably for the insured.

2. SAME—a *provision authorizing company to deduct indebtedness construed as not applying to general indebtedness.* A provision in a life insurance policy that "any indebtedness to the company will be deducted in any settlement of this policy or of any benefit thereunder," is limited to such indebtedness as might arise under the terms of the policy, either by lending money to the insured, as therein provided, or by extending time for paying premiums, and does not extend to general indebtedness of the insured to the company unconnected with the policy.

VICKERS, J., dissenting.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding.

EDWARD O'BRYAN, and WILLIAM N. MARSHALL, for appellant.

ANDERSON, ANDERSON & ANDERSON, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

The appellee, Ella Anson, recovered a judgment in the municipal court of Chicago against the appellant, the New York Life Insurance Company, for \$225.01, being a balance claimed to be due on a policy of life insurance issued by appellant on the life of Charles W. Anson, husband of the appellee. The judgment was affirmed in the Appellate Court for the First District, and the case is brought to this

court upon a certificate of importance by appeal from that judgment.

On August 11, 1904, appellant issued a policy of life insurance in the sum of \$1000 to Charles W. Anson, appellee being named as beneficiary. Anson died in 1907, having paid all the premiums as they became due. At the time the policy was issued and at the time of his death he was indebted to the appellant in the sum of \$225.01. The appellant claimed the right to withhold that sum under the terms and conditions of the policy, and paid the appellee \$774.99. This suit was brought to secure the amount thus withheld. The sole question for our determination is whether the appellant had the right to deduct the amount claimed to be due from Charles W. Anson in its settlement with appellee.

The policy of insurance contained a number of provisions, among them being one numbered 6, which was as follows: "Any indebtedness to the company will be deducted in any settlement of this policy or of any benefit thereunder," and it is by virtue of this provision that appellant claims the right to deduct this amount in its settlement with appellee.

The facts were stipulated, and they show that prior to making this insurance contract with the appellant, Charles W. Anson had been in its employ as an agent. He quit the service of appellant at the time this policy was issued and at that time was indebted to it in the sum of \$225.01. The indebtedness grew out of his transactions with appellant as its agent, extending over a period of about one year, and consisted of numerous items. It was in nowise connected with this policy of insurance but had to do entirely with his employment as an agent.

Appellee contends that the language of this provision is uncertain and ambiguous, and being so, that it must be construed most favorably for the insured; while appellant, on the other hand, contends that there is no ambiguity or un-

certainty in the language of the provision, but that under the plain meaning of its terms it gives to appellant the right to deduct from the amount due on the policy the amount of any indebtedness of the insured to appellant at the time of his death. The meaning of the language used in this provision is not free from doubt. It is not clear that the indebtedness referred to is meant to be the indebtedness of the insured or that of the beneficiary. Neither is it certain whether it refers only to indebtedness growing out of or connected with the policy of insurance or to indebtedness in general. In construing the meaning of any of the provisions of a policy of insurance regard must be had to the object and purpose which were intended by the contracting parties, and the policy being signed by the insurer alone and the language employed being that of the insurer, the provisions are usually construed most favorably for the insured in case of doubt or uncertainty in its terms. *Healey v. Mutual Accident Ass'n*, 133 Ill. 556.

Among the provisions in the policy preceding provision 6 is one which provides for cash loans to the insured on the pledge and security of the policy. The obligation to pay the annual premium and the possibility of borrowing money by pledging the policy were the only ways in which the insured could become indebted to appellant by reason of his connection with it as a policy holder. If we consider the object and purpose which were intended by the parties, in construing provision 6, what indebtedness can it be said was contemplated by them? Bearing that purpose in mind, it cannot be said that they contemplated any other indebtedness than that connected with the subject of the insurance. Appellant would hardly contend that by this provision it was contemplated that it might be enabled to purchase outstanding notes and claims against the insured equal to the amount of the policy and thus defeat entirely his object in purchasing the insurance, yet the contention of appellant that this was meant to refer to any possible

indebtedness would be broad enough, if sustained, to allow it to do so. The indebtedness that must be understood to have been referred to by appellant and the insured was that which might arise by virtue of the terms of the policy itself,—that is, either by lending money to the insured as the policy provided, or by extending the time for paying any premium, as it also provided might be done. The provision is uncertain and ambiguous, and being so, the trial court properly construed it most favorably for the insured.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE VICKERS, dissenting.

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THE PEOPLE *ex rel.* Allen E. Parmenter, County Collector,  
Appellee, *vs.* THE FENTON AND THOMSON RAILROAD  
COMPANY *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. TAXES—*highway commissioners cannot levy a tax to build bridge necessitated by new drainage ditch.* Highway commissioners cannot levy a tax to build a bridge necessitated by the construction of a drainage district ditch even though the drainage district is organized under the Levee act, which contains no provision compelling districts to build bridges made necessary by their ditches, as no statutory provision is required to compel the restoration of a highway; nor has the legislature power to authorize the levy of a road and bridge tax upon the tax-payers of the town for the benefit of a drainage district where the ditch is artificial.

2. SAME—*when levies for city and village purposes cannot be sustained.* The rule that a small sum which will reasonably cover such expenses of a city or village as cannot be classified may be levied under the description of contingent or miscellaneous expenses or incidentals, cannot be applied to sustain city taxes "for the fund known as the general fund for general city purposes, \$1097.40," and "consolidated, \$1824," or village taxes "for general fund, \$1250," and "for general fund, \$500," as such descriptions

do not satisfy the provision of section 1 of article 8 of the Cities and Villages act requiring the tax levy ordinance to specify in detail the purposes for which the appropriations are made and the sum appropriated for each purpose.

APPEAL from the County Court of Whiteside county; the Hon. WILLIAM A. BLODGETT, Judge, presiding.

A. A. WOLFERSPERGER, and WILLIAM D. BARGE, (J. A. CONNELL, of counsel,) for appellants.

J. J. LUDENS, State's Attorney, and JACOB CANTLIN, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county collector of Whiteside county applied to the county court of said county for judgments against delinquent lands for taxes of 1910. The appellants, four railroad companies, filed objections, which were overruled and judgments were entered, with orders of sale. The appellants each excepted and prayed for and were allowed what was termed a consolidated appeal to this court. There has been a joinder in error and a submission of the cause for decision.

The Chicago, Burlington and Quincy Railroad Company objected to the excess above thirty-six cents on \$100 of taxable property, of the road and bridge tax in the towns of Garden Plain and Fulton. The Chicago, Burlington and Northern Railroad Company and the Fenton and Thomson Railroad Company made like objection to such excess in the town of Fulton. Each town is under the cash system, and the certificates of the highway commissioners, consented to by the board of town auditors, each recited that an additional levy of twenty-five cents on each \$100 valuation was made necessary by the contingency of building a bridge, and the approaches thereto, across a new ditch recently

completed by the Cat-tail Drainage District through a public highway of the town, the highway in the town of Garden Plain being designated as the Fulton and Albany road and the one in the town of Fulton being known as the Lunt road. The building of new bridges is one of the ordinary expenses for which road and bridge taxes are levied. (*People v. Kankakee and Southwestern Railroad Co.* 237 Ill. 362; *People v. Wabash Railroad Co.* 248 id. 540.) But the question whether digging a ditch across a highway, necessitating a bridge, can ever be regarded as a contingency will not be considered, because the cost of constructing bridges across ditches of a drainage district must be borne by the district, and the highway commissioners cannot levy any tax for that purpose. (*Highway Comrs. v. Drainage Comrs.* 246 Ill. 388.) Counsel for appellee say that this case differs from that one because the district was organized under the Levee act, which does not compel districts to build bridges made necessary by digging a drainage ditch across a public highway. It does not require any provision of the statute to compel the restoration of a highway, and it is not even within the power of the General Assembly to authorize the levy of a road and bridge tax on the taxpayers of the town for the benefit of a drainage district where the ditch is an artificial one. (*Drainage Comrs. v. Highway Comrs.* 220 Ill. 176; *Morgan v. Schusselle*, 228 id. 106.) The decision of the court with reference to the road and bridge tax was wrong.

The Chicago, Burlington and Quincy Railroad Company and the Chicago, Burlington and Northern Railroad Company objected to that part of the tax levy by the city of Fulton which was designated in the ordinance levying the tax, "For fund known as the general fund for general city purposes, \$1097.40." The Chicago, Burlington and Quincy Railroad Company also objected to the item in the tax levy ordinance of the city of Rock Falls, specified as "Consolidated, \$1824," and to the item in the village tax in

the village of Tampico which was designated as "For general fund, \$1250." The St. Louis, Rock Island and Chicago Railroad Company objected to that part of the tax specified in the tax ordinance of the village of Erie as "For general fund, \$500." None of these items designated the purposes for which the tax was required. They did not give any intimation of the purpose to which the taxes, when collected, were to be devoted or furnish the tax-payer with any information as to the legality of such object. Article 8 of the Cities and Villages act is the authority for the levy and collection of taxes by cities and villages, and it requires a levy of the amount of the appropriations that have been made for corporate purposes by a tax levy ordinance, "specifying in detail the purposes for which said appropriations are made and the sum or amount appropriated for each purpose, respectively." The ordinances did not comply with that requirement, and it has always been held that ordinances such as those in question will not authorize the levy and collection of the tax. (*People v. Peoria, Decatur and Evansville Railroad Co.* 116 Ill. 410; *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 231 id. 209; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 207 id. 566; *People v. Cairo, Vincennes and Chicago Railway Co.* 237 id. 312.) The provision of the statute must receive a reasonable construction, and inasmuch as there are some small expenses of a city or village which can not be classified, a small sum which will reasonably cover such expenses may be levied under the description of contingent or miscellaneous expenses or incidentals. (*People v. Cairo, Vincennes and Chicago Railway Co. supra*; *People v. Chicago and Eastern Illinois Railroad Co.* 249 Ill. 549.) Where there is no objection that the amount so levied is not within the limits of that rule in amount, an objection to such an item will not be sustained, but the taxes cannot be upheld on such grounds in this case.



The judgments are reversed and the cause is remanded, with directions to sustain the objections as to the taxes mentioned in this opinion and to render judgment accordingly.

*Reversed and remanded, with directions.*

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THE PEOPLE *ex rel.* Ona L. Cline, County Collector, Appellee, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

*Opinion filed December 21, 1911.*

This case is controlled by the decision in *People v. Wabash Railroad Co.* (*ante*, p. 316.)

APPEAL, from the County Court of Piatt county; the Hon. ELIM J. HAWBAKER, Judge, presiding.

C. F. MANSFIELD, and F. M. SHONKWILER, (JOHN G. DRENNAN, of counsel,) for appellant.

HICKS & DOSS, for appellee.

PER CURIAM: This appeal is from the judgment of the county court of Piatt county overruling the objection of appellant to the excess of the road and bridge tax above thirty-six cents on each \$100 of the assessed valuation of its property in the town of Sangamon, and in entering judgment as applied for by the county collector. The record in this case is identical with that in *People v. Wabash Railroad Co.* (*ante*, p. 316,) and the questions involved are the same. For the reasons there stated the judgment in this case is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Frank C. Vaughan, County Collector,  
Appellee, *vs.* THE CHICAGO, BURLINGTON AND QUINCY  
RAILROAD COMPANY, Appellant.

*Opinion filed December 21, 1911.*

This case is controlled by the decision in *People v. Fenton and Thomson Railroad Co.* (*ante*, p. 372.)

APPEAL from the County Court of Lee county; the  
Hon. ROBERT H. SCOTT, Judge, presiding.

HENRY S. DIXON, and GEORGE C. DIXON, for appellant.

HARRY EDWARDS, State's Attorney, (J. E. LEWIS, of  
counsel,) for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Lee county overruling appellant's objections to judgment for a certain road and bridge tax of the town of Amboy and rendering judgment for the tax. Appellant paid all other taxes levied against it in Lee county but refused to pay the road and bridge tax extended against its property in the town of Amboy, levied by the commissioners of highways of said town under section 14 of the Road and Bridge act. That section authorizes a levy, not exceeding twenty-five cents on the \$100, in addition to the tax authorized to be levied under section 13, if in the opinion of the commissioners it is needed "in view of some contingency." Other objections are made to the validity of the tax objected to, but in our view of the case only the first objection need be considered. That objection is, that the certificate of the commissioners of highways required to be made by section 14 was insufficient.

The certificate states that in addition to the tax levied under section 13 an additional levy of eighteen cents on

the \$100 was required "to complete payment for erection of a new bridge across a new channel (drainage) of Green river." The construction of section 14, and what is a contingency within the meaning of the law, and what is required to make a certificate levying a tax under said section valid, have frequently been before this court. The precise question was decided at the present term in *People v. Fenton and Thomson Railroad Co.* (*ante*, p. 372.) Under the authority of previous decisions and the case cited the levy of the tax under section 14 must be held invalid, and the county court should have sustained appellant's objection to a judgment therefor.

The judgment of the county court is reversed.

*Judgment reversed.*

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JOHN M. WORLEY, Appellant, *vs.* JOHN CRAWFORD *et al.*  
Appellees.

*Opinion filed December 21, 1911.*

1. **EJECTMENT**—*only legal titles can be tried in ejectment suits.* In an ejectment suit only legal titles can be tried, and the defendants cannot avail themselves of the claim that the plaintiff's grantor, though holding and conveying the record title without restriction, was not the equitable owner of the land and that his deed did not vest the equitable title in the plaintiff.

2. **SAME**—*when proof of possession by plaintiff is not essential to recovery.* If the plaintiff in ejectment makes a *prima facie* case by proving that the legal title of record is in him, his right to recover does not depend upon whether he is able to prove possession or not, where the defendants do not dispute the record title and wholly fail to establish their claim of title by adverse possession under the Statute of Limitations.

3. **SAME**—*when testimony that plaintiff's grantor held land in trust is not admissible.* Where the record title is in plaintiff's grantor without restriction and he conveys such title unconditionally to the plaintiff, the testimony of the grantor is not admissible in a subsequent ejectment suit to show that he held title to the land in trust for a certain railroad company.

APPEAL from the Circuit Court of Douglas county; the Hon. SOLON PHILBRICK, Judge, presiding.

JOHN H. CHADWICK, and JAMES W. & EDWARD C. CRAIG, for appellant.

OUTTEN, ROBY, EWING & MCCULLOUGH, and CHARLES G. ECKHART, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an action of ejectment brought by appellant against appellees in the circuit court of Douglas county to the March term, 1909. The declaration alleges that appellant, (plaintiff,) on July 1, 1907, was possessed of all of block A in the original town of Hindsboro, Douglas county, (except the west two hundred feet thereof,) which the plaintiff claimed in fee, and being so possessed the defendants entered into the same, ejected the plaintiff therefrom and unlawfully hold possession. The defendants pleaded the general issue, only. The case has been twice tried in the circuit court without a jury. At the first trial a judgment was rendered for plaintiff. The defendants moved for and were granted a new trial under the statute. The case was then again tried at the March term, 1911, without a jury, the same judge presiding, and resulted in a finding and judgment for defendants, and plaintiff appealed.

On the trial of the case appellant introduced in evidence an affidavit, in which he stated that he and appellees claimed title through a common source, one Francis M. Hinds. No denial of the common source of title was made by appellees. The proper foundation being laid, appellant introduced in evidence a certified copy of a deed from Francis M. Hinds to Robert G. Hervey, dated June 4, 1875, for the premises in controversy; also a deed from Robert G. Hervey to the appellant, dated June 19, 1883, conveying "all the real estate now owned by the grantor in the town of

Hindsboro, Douglas county, Illinois, except such lots as have heretofore been improved by parties upon agreement upon the part of said Hervey to convey to them." That the premises in controversy were not embraced in the exception made in the deed of lots previously contracted by the grantor is not questioned by appellees, nor is it denied that the grantor, Hervey, owned the legal title at the time he made the conveyance to appellant. Neither is it denied that the description in the deed was sufficient, in connection with oral proof, to divest Hervey of the legal title and vest it in appellant. There being no denial of the common source of title the introduction of the deeds made a *prima facie* case for appellant, and he would be entitled to judgment unless his *prima facie* case was overcome either by proof of title in appellees or of outstanding title in a third party.

To overcome appellant's title, appellees proved by Hervey that he was the owner of the stock in certain corporations organized for the purpose of building lines of railroad between Peoria and Decatur, between Decatur and Paris, Illinois, and between Paris and Terre Haute, Indiana. No roads were built by these corporations but they were taken over by and merged into the Illinois Midland Railroad Company. The stock of the Midland company was all owned by Hervey and he proceeded to procure the right of way and build the road. A station named Hindsboro was located on land belonging to Francis M. Hinds. The village of Hindsboro was laid out at the place where the station was located. The right of way through the village was conveyed to the railroad company. The conveyance of the premises in controversy was made by Hinds to Hervey. The court permitted Hervey to testify that the conveyance made by Hinds to him of the premises was in trust for the Midland Railroad Company and that he held the title in trust for that company. Appellant objected to the introduction of this evidence, but the court, without ruling upon

its competency, announced he would hear it subject to the objections made. Appellees also introduced evidence to prove that the Midland Railroad Company took possession of the premises in dispute, or parts of them, in 1875 and has continued in possession thereof ever since. The railroad was built through Hindsboro in a south-easterly and north-westerly direction. Block A is on the southerly side of the railroad and abuts upon the right of way. There are eight lots in the block, each one hundred feet square, except the east lot, the east line of which is a straight north and south line and makes that lot triangular in shape, much narrower on the north than on the south side.

The claim of title by each of the parties being from a common source, it was only necessary for appellant to prove title in himself from that source. That he did this is beyond question. Hinds, the common source, conveyed the premises to Hervey. No conditions or limitations were expressed in the deed. Hervey conveyed the premises unconditionally to appellant. The testimony of Hervey that he held the title in trust for the Midland Railroad Company was not admissible in this proceeding to show that the deed from him did not vest the title in his grantee. Legal titles, only, can be tried in ejectment suits. *Walton v. Follansbee*, 131 Ill. 147; *Dawson v. Hayden*, 67 id. 52.

Appellees also sought to prove that parts of the premises have been in the adverse possession and occupancy of the railroad company continuously since 1875. Appellant claimed, and sought to prove, that he had possession of block A, except the west two lots, which are not now in controversy, since he received the deed from Hervey, on June 19, 1883, until 1908, when appellees entered upon and took possession of the premises. Upon the question who had been in possession for twenty years, and the character of the possession, the evidence was conflicting. On behalf of appellees Hervey testified, on direct examination, that the premises were occupied by the railroad company at the

time he made the deed to appellant. He testified he could not be positive, but his recollection was that at that time there were a coal yard and an elevator on the premises and each lot of block A was occupied by the railroad company. On cross-examination Hervey stated it was his recollection that buildings, such as coal yards and lumber yards, were placed on several of the lots by the railroad company or its lessees, but he could not be positive as to details and could not tell the location of the buildings. A witness named Welch testified for the appellees that he first knew block A in 1889 or 1890; that Pratt & Co., of Decatur, then had on the east end of the block an oats crib one hundred feet long and sixteen feet wide and also two cribs ten feet wide, but they did not occupy them very long; that the same premises and buildings were then next occupied by B. S. Tyler, and he was succeeded by Wright, who was, or had been, a buyer for Pratt & Co. Witness also testified that at one time (date not given) George F. Powers occupied part of the west end of the block with lumber sheds; also that at one time there had been a calaboose or village jail on part of the block. Witness did not know under whom any of the parties named by him occupied the premises except George F. Powers, who leased a part of the premises from the railroad company in 1899. Appellees introduced in evidence a lease from the Terre Haute and Indianapolis Railroad Company to B. S. Tyler, dated in 1895, for the east end of block A, which included the three lots at the east end of the block. The lease was at the will of the lessor, and was subject to determination by the lessee at any time upon ten days' notice. Appellees also introduced in evidence two leases from Volney T. Mallott, receiver of the Vandalia Railroad Company, to George F. Powers for parts of block A near the middle of the block. These leases were dated in 1899. They also introduced a lease from the Vandalia Railroad Company to the Crawfords for part of said block A, which was dated in 1905.

There is nothing in the record to show when or how the Terre Haute and Indianapolis or the Vandalia Railroad Company came into possession or became interested in the Midland Railroad Company or its property. We can only infer from the fact that the Terre Haute and Indianapolis and the Vandalia Railroad Company appear to have assumed control and management of the Midland Railroad Company that they succeeded to its rights, franchises and property. Appellees attempted to prove payment of taxes by the railroad company from 1893, but the evidence offered wholly failed to sustain this claim. They make no claim that the railroads mentioned were in the possession of the whole of the premises in controversy for twenty years and admit the legal title was in appellant. They also admit appellant has been in actual possession of part of the premises since he acquired title, but contend that appellees have been in possession of parts of the premises during all of that time and that the village has been in possession of other parts of said premises, and therefore judgment was properly refused appellant for those parts of the premises it is claimed he had not been in possession of after obtaining the deed from Hervey, and as to those parts of said block which he had been in possession of, they were not sufficiently described in his deed or in the evidence to enable the court to render judgment in his favor therefor and order a writ of possession to issue.

We do not deem it necessary to refer more than briefly to appellant's evidence on the subject of possession. He testified, and introduced other evidence in corroboration, that he took possession of the premises upon obtaining the deed from Hervey, and that personally or through his tenants he had continued in possession until ousted by appellees, in 1908. He testified he built cribs and a blacksmith shop on parts of the premises and rented parts of said premises for truck patches, and that he had paid the taxes every year. Appellant, however, was not required to prove



possession in himself for twenty years. His proof on this question was material only to contradict the claim of appellees to twenty years' possession. Appellant claimed and relied upon proof of legal title of record in himself. Unless the proof of this title in him was overcome by appellees he was entitled to judgment. While appellees do not specifically say the proof of possession in them was offered for the purpose of establishing title by twenty years' adverse possession, we cannot see the relevancy of their evidence on that subject upon any other theory. As we have before stated, they could not in this suit avail of the claim that Hervey was not the equitable owner of the premises and that his deed did not vest the equitable title in appellant, as a defense. We will assume, therefore, that the attempt to prove possession in appellees of portions of the premises for more than twenty years was made for the purpose of proving title by twenty years' adverse possession. If this is incorrect, then they offered no evidence that even tended in any degree to defeat the case made by appellant. If the twenty years' Statute of Limitations is relied on, then the appellees' evidence, which we have briefly outlined above, wholly failed to establish the defense by the degree of proof required by law. (*Zirngibl v. Calumet and Chicago Dock Co.* 157 Ill. 430; *Roby v. Calumet and Chicago Dock Co.* 211 id. 173; *Davis v. Howard*, 172 id. 340; *White v. Harris*, 206 id. 584.) Appellant having proved legal title in himself, his right to recover did not depend upon whether he had ever been in possession or not, unless the defense of the Statute of Limitations was interposed. The evidence offered by appellees was insufficient under either the seven years or twenty years' Statute of Limitations to defeat appellant's right to recover.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

THE PEOPLE *ex rel.* Chicago Bar Association, *vs.* JOHN A. SILHA.

*Opinion filed December 21, 1911.*

DISBARMENT—*case against an attorney must be clear to justify disbarment.* To justify disbarring an attorney the charges against him set out in the information must be established by clear and satisfactory evidence, and it is not sufficient that there is some evidence tending, if uncontradicted, to establish the charges, but which is, in fact, contradicted by the testimony of the respondent, which is corroborated in many particulars.

INFORMATION to disbar.

JOHN L. FOGLE, for relator.

CRUCE & LANGILLE, (O. J. C. WRAY, of counsel,) for respondent.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is an information filed in this court on the relation of the Chicago Bar Association against John A. Silha, an attorney of this court, for the purpose of disbarring the respondent and having his name stricken from the roll of attorneys.

The information contains two counts, the first of which charges that the respondent, on June 7, 1906, was employed as an attorney by Franciszka Marynowski Potempa to collect a claim due her from a fraternal benefit association, arising on a benefit certificate issued upon the life of Ludwig Marynowski, for the sum of \$600. The agreement between respondent and Mrs. Potempa was in writing, and is as follows:

"This agreement, made this 7th day of June, A. D. 1906, witnesseth: That the death certificate of Ludwig Marynowski, No. 1893, is to be sued upon by John A. Silha, and of the judgment, if recovered, three hundred dollars is to be paid to Franciszka Potempa, formerly Marynowski, and the balance to be paid to John A. Silha for his services.

JOHN A. SILHA,  
POTEMPA FRANCISZKA."

It is charged in this count that respondent, on May 29, 1909, made a settlement of said claim for the sum of \$400 and thereafter appropriated the money to his own use, and refused, after frequent demands, to pay it over, or any part of it, to his client.

The second count in the information charges that on the 27th day of December, 1907, respondent was employed by one Stanislaw Romanovski to institute and prosecute two certain suits in favor of himself and wife against one Schlechta, and that respondent agreed to immediately begin and prosecute said suits; that said suits were for damages for personal injury; that respondent received, at the time of such employment, \$50 for his fees and with which to pay costs of instituting said suits. It is charged that respondent neglected and refused to institute said suits, but often told Romanovski that such suits had been started and would come on for hearing in due course; that respondent retained the \$50 and did not commence the said suits, or either of them, until the right of action was barred by the Statute of Limitations.

The answer of respondent to this information sets out in detail his dealings with his clients mentioned in the two counts of the information, and specifically denies all misconduct in his relations and dealings with the parties mentioned. The cause was referred to a special commissioner to take the evidence and report his findings. The commissioner found from the evidence that the charges were sustained and that respondent's conduct was unprofessional and calculated to bring the profession of the law into disgrace and contempt. The cause is submitted for our consideration upon the information and the answer thereto, the report of the commissioner and exceptions thereto, together with a transcript of the evidence heard by the commissioner.

The transactions set out in the two counts of the information are wholly distinct, and the evidence heard by

the commissioner shows that the two transactions have no relation to each other. The evidence bearing upon the different counts will consequently require separate treatment.

The evidence bearing upon the charge contained in the first count is, in substance, as follows: Respondent was admitted to the bar by this court on June 16, 1897. He did not begin the active practice for some time after his admission. At the time of the hearing before the commissioner he had been engaged in the practice for about eight years. It is admitted, and was so found by the commissioner, that prior to the bringing of the present charges against him he had always sustained a good reputation for honesty and upright conduct in his office as an attorney at law. All of the persons connected with the transactions set out in both counts of the information, including respondent, were Poles. Mrs. Potempa was formerly Mrs. Marynowski, wife of Ludwig Marynowski, who in his lifetime held a benefit certificate in the Polish Roman Catholic Union, a fraternal beneficiary society which paid death benefits to its members. Marynowski at the time of his death held a certificate in the Catholic Union in favor of his wife for \$600. At the time of his death the Polish Roman Catholic Union was financially embarrassed and soon after went out of business because of its inability to meet its obligations. The widow afterwards married Stanislaw Potempa. On June 7, 1906, the claimant under the benefit certificate placed the same in the hands of respondent for collection under the written contract above set out. The respondent testifies,—and he is not contradicted on this point,—that at the time the claim was placed in his hands he spoke to Mrs. Potempa in the Polish language in the presence of her husband and translated to them the meaning of the contract, which they both fully understood. Suit was brought by respondent on the benefit certificate against the Polish society in the municipal court of Chicago on February 15, 1907. Respondent diligently prosecuted said

suit, and on June 17, 1907, recovered a judgment against the society for \$600. It appears that the claim was contested and that respondent was in court a great many times in connection with said suit. After judgment was rendered the Polish society prayed an appeal to the Appellate Court, which was granted and time fixed for the filing of an appeal bond and for a stenographic report of the evidence. An appeal bond was filed, signed by Wincenty Jaworski, who was president of the defunct Polish society. Afterwards, on July 14, 1907, on motion of respondent the appeal bond was stricken from the files and that case was at an end. Execution was issued and returned no property found. Respondent then brought an action against Jaworski on the appeal bond. This suit was stubbornly defended. On the trial of this case it became necessary for respondent to testify as a witness, whereupon he withdrew as counsel and William O. LaMonte was substituted as attorney for the plaintiff. The suit on bond was pending from February until December, 1908, during which time there were numerous appearances before several judges of the municipal court. A judgment was finally obtained on the 28th day of December, 1908, against Jaworski. During the pendency of this suit respondent paid out of his own money about \$30 in court costs. After judgment was obtained against Jaworski he sued out a writ of error from the Appellate Court and made preparation to present the case to that court. After the writ of error had been sued out, which does not appear to have been made a *supersedeas*, respondent caused execution to be issued against Jaworski and a levy was made upon some of his personal property. The evidence shows that respondent employed watchmen to look after the property levied upon, and they were in and about Jaworski's house for four days and four nights. Jaworski is a witness, and testifies in this case that he has a bitter feeling against respondent because of the persistent measures that he took to collect the judgment against him. No,

money was ever collected on the judgment against the Polish society. The evidence shows that Jaworski had in his hands \$312 that belonged to the Polish society and which he might have properly applied on the claim in suit. It also appears that one of the local lodges of the Polish society had \$87.76 on hand which had been collected from the members and which was due to the Polish society. Jaworski was apparently of doubtful solvency. In this situation negotiations between respondent and Jaworski and his attorney were commenced with the view of compromising and settling the claim for \$400. Respondent insisted on \$500 being paid, but finally agreed that if it was satisfactory to Mrs. Potempa he would accept \$400 in full satisfaction of the claim. The evidence shows that respondent had an interview with his client in which the whole situation was gone over, and the conclusion was reached that the proposition to settle for \$400 should be accepted. Respondent testifies that at the time of this interview he made a further contract with Mrs. Potempa, by which it was agreed that he was to pay her \$200 of the \$400 and retain \$200 for his compensation. Mrs. Potempa, when questioned in reference to this contract, admits that respondent saw her and talked the matter of a settlement over, but she says that she does not remember agreeing to accept \$200 for her interest in the claim. On May 29, 1909, the settlement for \$400 was agreed to by respondent and Jaworski, and at that time \$200 was paid to respondent, and afterwards, on June 1, the remaining \$200 was paid. Respondent testifies that at the time the settlement was effected Jaworski requested him to hold this money and not enter a satisfaction of the judgment until the \$87.76 could be collected from the local lodge that owed that sum to the Polish society, and that to oblige Jaworski and aid him in collecting that money to reimburse himself respondent agreed to, and did, hold the money and left the judgment unsatisfied until he was notified by Jaworski that

the collection had been made. Jaworski corroborates respondent on this point and no one contradicts him. Respondent held the \$400 paid him by Jaworski for two or three weeks and until Jaworski notified him that the local lodge had paid the \$87.76. The evidence shows that Mrs. Potempa manifested a great deal of impatience and anxiety about the collection of this claim; that she called on respondent a great many times before he received any money, apparently with the expectation that she would receive the money on her claim. She is wholly unacquainted with the English language and knows nothing about the procedure of collecting a claim by suit. The respondent testifies that within a short time after he had been notified that the \$87.76 had been paid to Jaworski he called on Mrs. Potempa and told her that he had collected the \$400 and offered to settle with her by the payment of \$200. He testifies that he called on her a second time; that he had the \$200 for her in twenty-dollar bills and offered to pay it to her if she would accept it in satisfaction of her claim, and that she refused to accept the money unless he would pay her \$320. The \$20 she claimed she had paid to another person to bring the matter before the Chicago Bar Association. The testimony is in irreconcilable conflict in reference to the transactions and conversations between the respondent and Mrs. Potempa and an agent she sent to see respondent. The evidence on behalf of relator tends to show that respondent was called on frequently during July and August and payment of the money demanded, and that he always claimed he had spent the money and could not pay it. Evidence of these conversations is given by Mrs. Potempa and her agent, Wengierski, and if these statements are to be accepted as true they would sustain the finding of the commissioner and justify this court in striking respondent's name from the roll. Respondent denies positively that he used the \$200, which he claims is all he had belonging to his client, and testifies that he had this

amount on hand at all times and was ready to pay it over if he could obtain a release from his client; that he never used the \$200, or any part of it, but kept the same for Mrs. Potempa, but she would not accept it and always demanded \$300. It is very clear that there was a dispute between the parties as to the amount due Mrs. Potempa. Wengierski, who is not a licensed lawyer, was employed by Mrs. Potempa to collect the claim from respondent and he was to receive \$100 for his services. It was he who construed the original contract between respondent and Mrs. Potempa as entitling her to \$300. It was Wengierski who conceived the idea of applying the persuasive influence of a complaint to the Chicago Bar Association in order to protect the integrity and honor of the legal profession and incidentally to improve his chances of making \$100. It was Wengierski who filed the complaint against respondent, and thereafter he appeared not only as the principal witness in the case, but he has saved the attorney for the relator much labor in assembling testimony. His conduct throughout this whole transaction manifests such a suspicious activity that no one can read this record and escape the conclusion that he was more anxious to make \$100 than to rid the legal profession of an unworthy member. After the complaint had been filed with the bar association respondent settled with Mrs. Potempa on her own terms and gave her a note for \$300 with personal security, which was paid, with interest, when the same matured a few months later. Respondent testified that he had the \$200 but did not have the other \$100; that it was necessary to borrow, and that Mrs. Potempa agreed to accept a note with security, and that respondent gave a note for \$300 and turned the \$200 in cash over to his surety. This is not disputed. The inference is that the surety wanted the use of the \$200 until the note matured, and Mrs. Potempa was willing to settle on that basis, and she expresses herself now as entirely



satisfied and as having no cause for complaint against respondent.

Upon the vital issues under the first count the evidence is conflicting. Respondent gives a reasonable account of his dealings with Mrs. Potempa, and in many respects his version of the matter is corroborated. The case for the relator depends almost entirely on the testimony of Mrs. Potempa and Wengierski. When the unimpeachable previous good character of respondent is considered in connection with his testimony, corroborated, as it is, in many important particulars, our conclusion is that the evidence does not so clearly preponderate in favor of the relator as to justify a finding that respondent is guilty as charged in the first count of the information. The rule established in this State is clearly expressed by this court in *People v. Matthews*, 217 Ill. 94, where, on page 103, it is said: "A careful consideration of the testimony leaves us unable to say that the charges set forth in the information filed against the respondent have been sustained by the character of proof required to justify the legal conclusion of guilt. The punishment to be inflicted by disbarment of an attorney is the destruction of his professional life. Only clear and satisfactory proof can justify a decision from which would flow consequences of such grave nature. In *People ex rel. v. Harvey*, 41 Ill. 277, we said that to justify the infliction of such heavy punishment as disbarment 'the case must be clear and free from doubt, not only as to the act charged, but as to the motive.' In *People ex rel. v. Barker*, 56 Ill. 299, wherein a judgment of disbarment was asked, it was said that the law undoubtedly requires 'evidence of clear and positive character \* \* \* to establish a charge so grave in its nature.' We find nothing in the record which will warrant us in attaching greater credence to the testimony of Mrs. Manupelli than to that of the respondent. His testimony is corroborated to an extent equal to that of hers. That he is guilty of the charges

specifically set forth in the information upon which he is being tried is not shown by evidence which is clear and positive and free from reasonable doubt."

The charge in the second count of the information is based on a transaction between respondent and Stanislaw Romanovski. In 1907 Romanovski was engaged in the grocery business in a building which was rented from one Schlechta. Romanovski had trouble with the landlord over the lease and consulted the respondent in reference thereto. The controversy seems to have been over Romanovski's right to longer remain in the building under the lease. He told the respondent that the landlord had come into his place of business and had created disturbances, and had assaulted or threatened to assault his wife and had injured his business, and that he wanted to employ respondent to bring two suits for damages against the landlord. Romanovski testifies that he gave respondent \$50, which was to pay the costs for starting the two suits. Respondent testifies that he received the \$50 as a retainer fee and that \$50 more was to be paid before any suit was to be commenced, and out of the last \$50 respondent agreed to advance the costs. At the time respondent was employed and received the \$50 the following receipt was executed:

"CHICAGO, December 27, 1907.

"Received of Stanislaw Romanovski fifty no/100 dollars, ac. fees in Romanovski vs. Schlechta.

\$50.00

JNO. A. SILHA, Att'y."

Respondent testifies that he had frequently advised Romanovski in reference to his rights under the lease before the \$50 was paid. It also appears that afterwards a niece of Romanovski received a personal injury about the rented premises for which it was thought Schlechta would be liable in damages. Respondent was also consulted in reference to this matter and gave it as his opinion that she had a good cause of action against Schlechta. The testimony of Romanovski and respondent is conflicting as to the under-

standing between them at the time the \$50 was paid. A short time after the payment of the \$50 Romanovski came to respondent and accused him of selling out to Schlechta. He said to respondent: "You are bought by these people. These people are Bohemians and you are Bohemian and I am Polish." The basis for this grave charge against respondent was that Romanovski had either seen respondent and Schlechta talking together on the street or had heard that they had spoken together on the street. Respondent thereupon told Romanovski that he would withdraw and that he had paid him enough for the services rendered up to that time. Romanovski testifies that he paid the \$50, not as fees but to cover court costs in commencing two suits against Schlechta, and that respondent frequently told him that the suits had been commenced, and that afterwards, upon learning that no suit had, in fact, been commenced, he demanded the return of the \$50, which respondent refused to pay. Relator's case under this count rests entirely upon the testimony of Romanovski, which is contradicted in all material respects by the testimony of respondent. We think the written receipt given at the time the money was paid tends slightly to corroborate respondent, and that the testimony of Romanovski is not sufficient to warrant us in finding that the second count in the information is sustained.

Our conclusion upon the whole case is, that there is not in this record that clear and satisfactory evidence which would warrant this court in inflicting the severe penalty of disbarring respondent.

The rule against respondent to show cause will be discharged.

*Rule discharged.*

THE PEOPLE *ex rel.* Jack Lusk, County Collector, Appellee, *vs.* THE CAIRO, VINCENNES AND CHICAGO RAILWAY COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. TAXES—*the tax to pay damages for laying out roads is not authorized unless damages have been agreed upon.* The tax to pay damages for laying out, widening, altering or vacating roads, which is authorized by section 15 of the Roads and Bridges act, cannot be sustained unless it appears from the record of the commissioners of highways that damages have accrued and that they have been agreed upon, allowed or awarded by the commissioners for one or more of such purposes; and it is not sufficient that the money is needed for general road purposes, for which a levy is authorized by section 13 of said act.

2. SAME—*when description of land is too uncertain to sustain tax levy.* Descriptions of two tracts of land, one reading, "on a part of the south-east quarter of the south-east quarter of section 3, township 9, south, range 6, east, 19.05 acres," and the other reading, "on a pt. west pt. S. E. N. E. and N. W. N. E. sec. 10, township 9, south, range 6, east," in a certain county, are so indefinite as to render the tax levies void.

3. SAME—*right of county clerk to plat lands for taxation.* If a property owner, after notice, neglects and refuses to plat his lands so that they can be correctly described for the purpose of taxation, the lands may be platted by the county clerk under the provisions of section 62 of the Revenue act.

APPEAL from the County Court of Saline county; the Hon. K. C. RONALDS, Judge, presiding.

P. J. KOLB, and W. F. SCOTT, (GLENNON, CARY, WALKER & HOWE, of counsel,) for appellant.

W. H. STEAD, Attorney General, and W. C. KANE, State's Attorney, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application for judgment and order of sale by the collector of Saline county against the property of the appellant for certain taxes levied in the year 1910. The

appellant appeared and filed objections and the same were sustained in part and overruled in part, and judgment and order of sale were rendered against the appellant's property for an additional tax levy of \$111.96 in the town of East Eldorado and an additional tax levy of \$39.19 in the town of Raleigh, under section 15 of the Roads and Bridges act, "for the payment of damages which have been agreed upon, allowed and awarded for laying out, widening, altering and vacating roads" in said respective towns; for \$8.37 levied "on a part of the south-east quarter of the south-east quarter of section 3, township 9, south, range 6, east, 19.05 acres," and for \$13.94 levied "on a pt. west pt. S.E. N.E. and N.W.N.E. sec. 10, township 9, south, range 6, east," in Saline county. This appeal has been prosecuted by the railway company.

It appeared from the records of the town clerks in said towns that no damages had been agreed upon, allowed and awarded for laying out, widening, altering and vacating roads in either of said towns, and the oral testimony of the commissioners of highways given on the hearing of said objections tended to show that said tax levies had been made for general road purposes in said towns and should have been made under section 13 of the Roads and Bridges act, and if the power to make a levy under that section had been exhausted, then under section 14, if a contingency existed which would authorize an additional levy. Section 15 reads as follows: "When damages have been agreed upon, allowed or awarded for laying out, widening, altering or vacating roads or for ditching to drain roads, the amounts of such damages, not to exceed for any one year, twenty cents on each \$100 of the taxable property of the town, shall be included in the first succeeding tax levy, provided for in section 13 of this act, and be in addition to the levy for road and bridge purposes; and when collected shall constitute and be held by the treasurer of the commission-

ers as a separate fund to be paid out to the parties entitled to receive the same." (Hurd's Stat. chap. 121, p. 1914.)

It is too clear for argument that no valid tax levy can be made under section 15 to raise a fund with which to pay damages for the purposes named in said section unless it appears that damages have accrued, and that they have been agreed upon, allowed or awarded by the commissioners of highways for some one or more of the purposes specified under section 15, and that a tax levy for the purpose specified in section 13 cannot be made under section 15. Section 10 of the Roads and Bridges act provides that the town clerk shall be *ex officio* clerk of the commissioners of highways, and that he shall keep a record of all the official acts and proceedings of the commissioners. The taxpayer of the town, when his property is to be subjected to the payment of a tax, has the right to be informed by the record as to the liabilities of the town and for what purpose his property is being taxed. A valid tax levy can not be made for the purposes specified in section 15 unless the record required to be kept by the town clerk shows that the damages for some one of the purposes specified in section 15 have been agreed upon and allowed or awarded to the property owner by the commissioners of highways. As it appears there was no valid basis for said town levies, the county court erred in rendering judgment and order of sale for said additional tax in said towns.

It is also apparent, we think, that the description of the two tracts of land against which judgment and order of sale were sought are so uncertain and indefinite as to make those tax levies void. (*Olcott v. State*, 5 Gilm. 481; *Pry v. Pry*, 109 Ill. 466; *Brickey v. English*, 129 id. 646; *Lancey v. Brock*, 110 id. 609.) If the appellant, on notice, neglected and refused to plat its lands so that they can be correctly described for the purpose of taxation the same can be platted by the county clerk under the provisions of section 62 of the Revenue act. (Hurd's Stat. 1909, p. 1836.)

We are of the opinion the county court erred in rendering judgment and order of sale against appellant's property.

The judgment of the county court will be reversed and the cause remanded.

*Reversed and remanded.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, *vs.* THE HARTFORD LIFE INSURANCE COMPANY, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. INSURANCE—*there is a distinction between contracts for life insurance and contracts for fire insurance.* One who takes a fire insurance policy makes the contract for his own benefit for a short period of time and does not need the aid of a statute designed to secure the solvency of the company at a distant period of time, but policies of life insurance companies run for comparatively long periods and are mainly for the protection of a class of dependents entitled to protection against involency, which might follow reckless competition.

2. SAME—*regulation designed to guard persons taking life insurance against involency of company is valid.* A regulation designed and adapted to secure equality among those contributing to the funds and resources of life insurance companies and to secure financial ability upon the part of the companies to meet obligations which may mature in the distant future does not violate any prohibition of the constitution.

3. CONSTITUTIONAL LAW—*right to contract is subject to regulation under the police power.* The right to contract is a property right, but, like all other rights, its exercise is subject to the police power, and may be limited and restricted for the preservation of the public health, morals, safety or welfare or to prevent a well known evil and wrong.

4. SAME—*act of 1891, prohibiting discrimination in life insurance rates, is not invalid as stifling competition.* The act of 1891, prohibiting discrimination between life insurants of the same class and of equal expectation of life, is not unconstitutional upon the ground that its real purpose is to stifle competition among life insurance companies, and that it imposes restrictions upon the business of selling contracts for life insurance that are not im-

posed upon the business of selling contracts for fire insurance or other things.

5. *SAME—provision for forfeiture of agent's license for violation of the act of 1891 is not invalid.* The provision of the act of 1891 for a forfeiture of a life insurance agent's license if he violates the provisions of said act against discrimination between insureds of the same grade is not invalid upon the ground that the penalty is not proportionate to the offense.

6. *EVIDENCE—when refusal to permit proof of rule against rebating is proper.* In an action to recover a penalty for violation of the act of 1891, prohibiting life insurance companies from discriminating between insureds of the same grade, it is not error to refuse to permit proof of a rule of the company against rebating which was not enforced but violated by the company's manager.

7. *PLEADING—when it is not necessary to allege that the discrimination was unjust.* In an action in the municipal court of Chicago to recover a penalty for the violation of the Insurance act of 1891, if the statement sets out with particularity all the facts showing a violation of the act, it is not essential that the statement allege that the discrimination was unjust.

8. *PENALTIES—when rule that informer cannot reap benefit of his wrongful act does not apply.* The rule that the law will not permit an informer to reap the benefit of his own wrongful act in inducing a violation of a statute does not apply where he does not advise or induce the commission of the crime, but merely creates the conditions under which an offense may be committed.

9. *SAME—what does not defeat action to recover a penalty.* It is not a violation of the law for a person to find out whether offenses are being committed although he does so by artifice or deceit, such as using decoy letters, writing letters under assumed names or furnishing money to secure evidence; and the fact that the informer did such things does not defeat the recovery of a penalty for violation of the Insurance act of 1891.

10. *SAME—it is proper for the jury to fix amount of penalty in civil action.* An action to recover a penalty for violation of the Insurance act of 1891 is a civil action, and it is proper in such case for the jury to fix the amount of the penalty. (*Armstrong v. People*, 37 Ill. 459, distinguished.)

WRIT OF ERROR to the Municipal Court of Chicago;  
the Hon. EDWIN K. WALKER, Judge, presiding.

HARVEY STRICKLER, for plaintiff in error.



JOHN E. W. WAYMAN, State's Attorney, and DAVID K. COCHRANE, for defendant in error.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

The municipal court of Chicago entered a judgment on the verdict of a jury against the Hartford Life Insurance Company for a penalty of \$750 in a suit of the fifth class brought by the People of the State of Illinois for a violation of the act prohibiting discrimination between life insureds of the same class and equal expectation of life, by issuing a policy to Alfred Bellstrom for less than the fixed annual premium. The defendant moved the court to strike the amended statement of claim from the files, and one of the reasons assigned was that the act violated constitutional restrictions upon the legislative power and was therefore void. The motion was overruled, and, the validity of the act being involved, the record has been brought to this court by writ of error.

We decided in *Metropolitan Life Ins. Co. v. People*, 209 Ill. 42; that the nature of the life insurance business and the interest of the public in it are such as to subject it to regulation, and that the act prohibiting discrimination in favor of individuals between insureds of the same class and with equal expectation of life is a valid exercise of the power of regulation. Subsequently, in *People v. Commercial Life Ins. Co.* 247 Ill. 92, it was contended that the act was void as a police regulation because it excluded fraternal associations furnishing life insurance, thereby discriminating arbitrarily between companies in the same class. That question was considered, and it was held that there is such a fundamental difference between life insurance companies and fraternal associations that they are not substantially in the same class or situation, and there was, therefore, no arbitrary discrimination against life insurance companies. It is not now contended that insurance

companies are not subject to police regulation nor that there is no difference in character or situation between life insurance companies and fraternal associations, but the argument is, that the real purpose of the act is to stifle competition between life insurance companies and compel them to have only one price for their policies and make everybody pay that price, which cannot be deemed for the public welfare; that there is no difference, in principle, between selling contracts for life insurance and fire insurance and the sale of other contractual obligations, such as bonds, notes or mortgages, or the selling of any other property. There are material differences between life insurance contracts and those of fire insurance companies, as well as the sale of bonds, notes, mortgages or other property. The purchaser of property or securities takes title to the same and pays the price agreed upon, and when one takes a fire insurance policy he makes the contract for his own benefit for a short period of time, and does not need the aid of a statute designed to secure the solvency of the company at a distant period of time. The policies of life insurance companies run for comparatively long periods of time, and are mainly for the benefit of a class of dependents entitled to protection against the insolvency which might follow reckless and ruinous competition. The right to contract is a property right, but, like all other rights, its exercise is subject to the police power, and may be limited and restricted for the preservation of the public health, morals, safety or welfare or to prevent a well known evil and wrong. (*Ritchie v. Wayman*, 244 Ill. 509.) A regulation designed to secure equality between those contributing to the funds and resources of life insurance companies and to secure financial ability to meet obligations which may mature in the distant future and adapted to that end does not violate any prohibition of the constitution. Similar acts are in force in a large number of the States, (Joyce on

Insurance, sec. 1091, note; Richards on Insurance Law, 703;) and have been regarded as valid.

The act provides for a forfeiture of the agent's license, and counsel insists that it is void because that penalty is not proportionate to the offense. Other acts provide for the revoking of licenses to practice professions requiring great skill and learning where the holder has violated the law, and they are considered valid. The occupation of an insurance agent does not call for learning or a previous course of study but only for persuasive powers, and if he violates the law he may be lawfully deprived of the right to prosecute that business.

It is also argued that the statement of claim was insufficient because it did not allege that the discrimination was unjust, although it stated with particularity all of the facts showing a violation of the act. The first section of the act fixes the character of discrimination prohibited, and the second section declares that any company making any unjust discrimination, as enumerated in section 1, shall be deemed guilty of having violated the act. It was not necessary, after stating the facts in the claim, to denounce the discrimination as unjust.

August C. Wegner, who was the informer and entitled to one-half of the penalty, was an agent of the New York Life Insurance Company, and he gave to John F. Goggin \$44 to pay as premiums on policies which he would get from other insurance companies, and he was to get rebates if he could. In pursuance of the plan Wegner wrote a letter June 29, 1910, to which he signed the name of Goggin, directed to Harry B. Johnston, manager of the defendant at Chicago, saying that he had received a proposition for insurance in that company and had a few other offers, but concluded to accept Johnston's offer. He requested Johnston to call July 7 at his residence. Goggin had received no proposition for insurance and the statement was false. Goggin saw the letter when Wegner was at his house and

he mailed it to Johnston. Johnston employed sub-agents on commission and sent Louis P. Hazen to Goggin's home as requested, and Hazen took an application for a policy for \$1000, which was afterward delivered. The regular annual premium was \$22.08 and Wegner gave Goggin \$16.56, with which Goggin paid for the policy. Wegner had told Goggin that he would furnish the money for the premium and all the discount or rebate Goggin could get would be his. In pursuance of that arrangement Wegner paid Goggin the amount of the rebate, which was the difference between \$16.56 and \$22.08. On July 18, 1910, Johnston wrote Goggin enclosing the policy, saying that the balance due was \$16.56, which was to be sent to the office, and adding, "I hope you will be able to secure more business for us on the same basis." Wegner wrote a letter in reply, saying that Johnston had offered to extend the terms granted to Goggin to others; that he had a friend, Alfred Bellstrom, whom he had told about his premium, and if Johnston could see Bellstrom on August 2, at eight P. M., he believed he could secure an application. Goggin signed the letter and gave it back to Wegner. Another letter was written to Johnston, saying that Ida Waters wanted to take out some insurance and Goggin would send her to the office with a letter, if he could persuade her to go. Johnston wrote to Goggin, saying that he had recommended two prospects for insurance, and in case the policies were issued and paid for, twenty-five per cent of the premium would be paid Goggin. Johnston sent Hazen to see Bellstrom and took his application for a policy for \$1000, which was issued, and the annual premium was \$29.25. The defendant gave Bellstrom a receipt for that amount, but Bellstrom paid only \$21.94 in a check of J. H. Fetterhoff, furnished him by Wegner. This was the act of discrimination alleged in the statement of claim, which did not include the transaction with Goggin or Ida Waters. On September 9 Goggin wrote to Johnston claiming a commis-

sion of twenty-five per cent on the Bellstrom and Waters policies which had been deducted by the defendant, and Johnston answered on September 12, saying that the other parties were informed by Goggin that the twenty-five per cent was to be credited to them, as had been done in Goggin's case, and he understood it was to be given to the other parties. On September 22 Goggin wrote to Johnston that he had inquired of his friends and found that they had got the commission instead of himself, and that they would call the matter square.

It is objected that the court admitted evidence of transactions not pertaining to the case and leading the jury to believe that the defendant had been guilty of other offenses. The letter to Goggin about securing other business was brought into the case on the cross-examination of Bellstrom and was admitted in evidence without objection. It was the theory of the defendant that there was an arrangement with Goggin for twenty-five per cent commissions, and this was presented as the sole defense. The letters about the Waters policy were offered in evidence by the defendant, so that there is no ground for the complaint.

The court did not err in refusing to permit proof of a rule prohibiting rebating. It is said that it would tend to mitigate the amount of the penalty, but it could not have that effect where the manager having charge of the agency knew that the rule was being violated. If the defendant was guilty and subject to a penalty, the existence of a rule which was not enforced but was violated by the defendant's manager would have no tendency to reduce the penalty.

It is next argued that the trial court failed properly to control the conduct of plaintiff's counsel in asking improper questions and in making improper statements at the trial. Bellstrom had testified and later in the trial was recalled and asked if he had seen the attorney for the defendant at the State's attorney's office, if he went there at the request of the attorney, and what occurred there. He per-

sisted in asking the questions, and in reply to objections of defendant's attorney and interrogations of the court simply said that the evidence would tend to show the facts of the case and that it would straighten out the testimony so that the jury would get it right, and that he wanted to show what those people falsely represented at Bellstrom's house. The conduct of the attorney was grossly improper and had no object except to create prejudice or raise an unfavorable inference against defendant's attorney. The court finally sustained the objection, and in view of all the evidence we are not inclined to reverse the judgment because of the conduct of the attorney.

The defendant offered to prove that the commission on Bellstrom's policy was sixty per cent of the face of the premium, in connection with the evidence that he paid twenty-five per cent less than the amount of the premium, but was not permitted to make the proof. The object was to prove that the agent had divided the commission with Goggin for services rendered in securing the insurants. It is not claimed that the agent had a right to dispose of his commission as he saw fit or to rebate a part of it to the insured where the insurance company received the entire amount to which it was entitled, but it is assumed here, as it was in *Metropolitan Life Ins. Co. v. People, supra*, that doing so would be a violation of the terms of the act. That question, therefore, is not considered, and we do not think the jury could have believed that the allowance to Bellstrom was made as a commission to Goggin. It is true that Goggin directed the attention of Johnston to Bellstrom, but the conduct of the parties indicates pretty clearly that the proposition for commissions was a mere device, since the deduction of twenty-five per cent was made to Bellstrom directly, without any inquiry to Goggin. Proof that the commission was sixty per cent of the premium would not have aided the defendant on that question.

The court refused to instruct the jury that the law does not permit an informer to reap a benefit from his own wrongful conduct in inducing a violation of a statute. One cannot arrange for a crime to be committed against himself or his property and aid, encourage or solicit the commission of the crime, (*Love v. People*, 160 Ill. 501,) but if he does not induce or advise the commission of the crime and merely creates the condition under which an offense against the public may be committed the rule does not apply. (*People v. Smith*, 251 Ill. 185.) It is not a violation of the law to find out whether offenses are being committed although it is done by artifice or deceit, such as the use of decoy letters, writing letters under assumed names or furnishing money to secure evidence. We see no substantial distinction between the act of an informer and that of one who secures evidence of criminal acts for a reward, and undoubtedly a prosecution could not be defeated because the evidence is so obtained.

Counsel contends that it was error for the jury to fix the amount of the penalty. There seems to be no uniformity of practice in the courts of different States with respect to the proper functions of the court and jury in such cases. In this State the action for a penalty is a civil action in debt, (*Metropolitan Life Ins. Co. v. People*, *supra*,) and we see no reason why it should not be governed by the same rule that obtains in other civil cases where the jury fixes the amount. That has heretofore been the unquestioned practice. The case of *Armstrong v. People*, 37 Ill. 459, does not apply, because that was a criminal prosecution for an offense punishable by imprisonment in the penitentiary and a fine, while this is a civil action to recover a penalty as a debt.

We cannot say that the judgment was wrong, and accordingly it is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* William L. O'Connell, County Collector, Appellee, *vs.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. TAXES—*highway commissioners' certificate must state what the contingency is requiring additional road tax.* To authorize an additional road tax under section 14 of the Roads and Bridges act the highway commissioners' certificate must state that the tax is required for a contingency and must state what the contingency is.

2. SAME—*what is not a contingency authorizing an additional road tax.* The "contingency" contemplated by section 14 of the Roads and Bridges act is some unusual or extraordinary event that does not happen regularly in the ordinary course of events, and a certificate stating that an additional tax is needed "in view of the contingency and emergency" that two certain roads, one mile in length, "need to be stoned and macadamized and certain bridges repaired and certain culverts constructed," does not show such a contingency as is contemplated.

APPEAL from the County Court of Cook county; the Hon. JOHN E. OWENS, Judge, presiding.

ROBERT DUNLAP, LEE F. ENGLISH, and JAMES L. COLEMAN, for appellant.

Mr. JUSTICE VICKERS delivered the opinion of the court:

The collector of taxes for Cook county made application for judgment to the county court for \$142.46 delinquent taxes levied upon the property of the Atchison, Topeka and Santa Fe Railway Company. Objections were filed by the railroad company to the rendition of judgment for this tax, which was levied under section 14 of chapter 121 of the Revised Statutes as an additional tax for roads and bridges in the town of Stickney, in said county. The tax was levied in pursuance of a certificate of the commissioners of highways made to the board of town auditors and the assessor of said town, which purported to state a contingency and emergency that would authorize an addi-



tional levy for roads and bridges in said township under section 14 of the Road and Bridge act. The certificate of the board of commissioners of highways stated that said additional tax was needed "in view of the contingency and emergency that certain roads in said town, to-wit, one mile of Seventy-ninth street and one mile of Fifty-fifth street, are impassable and need to be stoned and macadamed and certain bridges repaired and certain culverts constructed." Under this certificate the board of town auditors of said town gave their consent to the levy of the tax which is objected to by appellant.

The question presented by the objection to this tax has been before this court and passed on so frequently in the last few years that it would seem to be unnecessary to enter into a reconsideration of the proper construction to be given to sections 13 and 14 of the Road and Bridge law. It has been established by numerous decisions that in order to authorize an additional levy under section 14 of said act the certificate of the commissioners of highways must state that the tax is needed to meet a "contingency" and that the certificate must state what such contingency is. (*St. Louis, Alton and Terre Haute Railroad Co. v. People*, 224 Ill. 155; *People v. Cairo, Vincennes and Chicago Railway Co.* 231 id. 438; *People v. Lake Erie and Western Railroad Co.* 248 id. 32.) A "contingency," under section 14 of the Road and Bridge law, must be some unusual or extraordinary event which does not happen regularly in the ordinary course of events. (*People v. Kankakee and Southwestern Railroad Co.* 237 Ill. 362; *People v. Elgin, Joliet and Eastern Railway Co.* 243 id. 546; *People v. Lake Erie and Western Railroad Co. supra.*) The certificate of the commissioners of highways in the case at bar fails to state a contingency within the meaning of the statute.

The county court erred in overruling appellant's objection, for which the judgment must be reversed.

*Judgment reversed.*

THE CITY OF CHICAGO, Appellee, vs. PHILIP STEIN,  
Appellant.

*Opinion filed December 21, 1911.*

1. SPECIAL ASSESSMENTS—*no presumption can be indulged in aid of jurisdiction of court.* In special assessment proceedings, where the property of a citizen may be taken upon notice by publication and without personal notice to the property owner, no presumption can be indulged in support of the jurisdiction of the court where the proceedings are had but the proceedings must be in strict conformity to the statute; and this must be made to appear upon the face of the record of the proceedings.

2. SAME—*court is without jurisdiction if certificate of publication is invalid.* If the certificate of publication in a special assessment proceeding is not made by the publisher or his authorized agent the certificate is invalid, and the court is without jurisdiction to confirm the assessment over a specific objection to such jurisdiction, made under a special appearance.

3. SAME—*secretary of a newspaper corporation has no implied authority to make a certificate of publication.* The secretary of a newspaper corporation has no implied authority, by virtue of his office, alone, to make a certificate of publication for such company.

FARMER, J., dissenting.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

STEIN, MAYER & STEIN, for appellant.

PHILIP J. MCKENNA, and EDGAR R. HART, (WILLIAM H. SEXTON, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The city of Chicago sought to have confirmed a special assessment to curb, grade and pave South Oakley avenue, in the city of Chicago, from West Eighteenth street to Blue Island avenue. The property of the appellant was assessed, and an agreed case was made up under section 103 of the

Practice act and submitted to the superior court. The assessment was confirmed and this appeal has followed.

The appellant entered a special appearance and but one question is raised upon this record, viz., whether the certificate of publication filed by the publisher is sufficient to give the court jurisdiction to confirm the assessment.

The certificate is in the following form:

"STATE OF ILLINOIS, }  
County of Cook. } ss.

"This affiant, David E. Town, being first duly sworn, says that the Chicago Evening Post Company, a corporation, is the publisher of the *Chicago Evening Post*, and that he is the secretary of said corporation and makes this affidavit in its behalf; that a notice, of which the annexed notice is a true copy, has been published five successive days in the *Chicago Evening Post*, a daily newspaper printed and published in the city of Chicago, in said county, and that the date of the first paper containing the said published notice was the 15th day of December, 1910, and the date of the last paper the 20th day of December, 1910.

DAVID E. TOWN,  
Secretary Chicago Evening Post Co.

"Subscribed and sworn to before me this 21st day of December, A. D. 1910.

TIMOTHY SULLIVAN, Notary Public."

The main reason urged as ground of reversal in this court is, that David E. Town, the secretary of the Chicago Evening Post Company, was not authorized to make the certificate, and that therefore there was no proof of publication.

The Local Improvement act contains no provision for proving the publication of the notice required by section 44 of that act, (Hurd's Stat. 1909, chap. 24, par. 550,) hence the proof must be made, according to section 1 of chapter 100 of Hurd's Statutes, by "the certificate of the publisher \* \* \* or his authorized agent." There was no proof that Town, as secretary, had been authorized by the board of directors of the Chicago Evening Post Company to make said certificate or such certificates in general, or that the Chicago Evening Post Company had knowingly theretofore permitted Town, as secretary, to make such cer-

tificates at all, or to such an extent that his authority to make such certificates could be inferred. The question is therefore narrowed to whether Town, by reason of the fact, alone, that he was secretary of the corporation, can properly be held, as a matter of law, to have authority to make such certificate.

In statutory proceedings like those provided in the Local Improvement act, where the property of the citizen may be taken upon notice by publication and without personal notice to the property owner, no presumption can be indulged in support of the jurisdiction of the court in which the proceedings are carried on, but the proceedings must be in strict conformity to the statute; and this must be made to appear upon the face of the record of the proceedings. (*City of Chicago v. Wright*, 32 Ill. 192; *McChesney v. People*, 148 id. 221; *Payson v. People*, 175 id. 267; *Sumner v. Village of Milford*, 214 id. 388.) In the *Sumner case* it was said (p. 393): "Jurisdiction of a particular case must be acquired in the manner prescribed by the law. Where the mode of acquiring jurisdiction is prescribed by the statute, compliance therewith is essential or the proceedings will be a nullity." If, therefore, the certificate of publication was not made by the publisher or its authorized agent the certificate was not a valid certificate and the court was without jurisdiction to confirm the assessment.

David E. Town was an officer of the corporation, but was he its authorized agent for the purpose of making such certificate? We think not. In *Cook on Corporations* (vol. 3,—6th ed.—sec. 717,) it is said: "The secretary is one of the corporate officers, but he has practically no authority." And in a foot-note the same author says: "A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." In *Cobb v. Glenn*, 57 W. Va. 49, where it was held that the secretary of a corporation has no inherent power to sell real estate, the

court quotes the following from Thompson on Corporations, sec. 4697: "The law does not ordinarily imply in the secretary of a business corporation the power, *ex officio*, to bind the company by means of letters or documents signed officially,"—and this statement seems to be well supported by authority. In *Taylor v. Sutherlin-Meade Tobacco Co.* 60 S. E. Rep. (Va.) 132, which was an attachment sued out by the tobacco company, a motion was made to quash the writ because the affidavit upon which it issued did not show that it was made by "the plaintiff, his agent or attorney," as was required by the statute, it having been made by its secretary and treasurer. The trial court overruled the motion, but upon appeal the affidavit was held insufficient and the attachment was quashed, and the court, after referring to an earlier case, said (p. 134): "So in this case, unless the court is prepared to announce, as a matter of law, that the words 'secretary and treasurer' necessarily denote the existence of the relation of agency between affiant and the attaching corporation, then the attachment must fall. The general doctrine is well settled that the powers of a private corporation, so far as its dealings with third persons are concerned, are primarily lodged in its board of directors, from which source the officers, either expressly or by implication, derive such measure of authority as may be bestowed upon them. \* \* \* The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it. The secretary is one of the corporate officers, but he has practically no authority. The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made. (3 Cook on Corp.—6th ed.—sec. 717.) A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all. \* \* \* These principles are sustained by numerous decisions of courts of the highest respectability

and are laid down by standard writers on private corporations as well settled law." (See, also, *North Pennsylvania Iron Co. v. Boyce*, 71 N. J. L. 434, and *Bradford Belting Co. v. Gibson*, 68 Ohio St. 442.) "An instrument purporting to be an assignment of an account by a corporation, executed in its name by its secretary, cannot be taken as the valid act of the corporation without proof that the secretary had power to make it." (*Wolfe & Gaines v. Davenport, etc. Railroad Co.* 93 Iowa, 218; *Read v. Buffum*, 79 Cal. 77; *Blood v. Marcuse*, 38 Cal. 590.) The following cases hold that a secretary of a private corporation, as such, has no power to enter into contracts for his company: *Bank v. Hogan*, 47 Mo. 472; *Ross & Co. v. Eastham*, 73 Kan. 464; *Reid v. Packing Co.* 47 Ore. 215; *Bank v. Hotel Co.* 103 S. W. Rep. (Tex.) 1120. In *American Central Railway Co. v. Miles*, 52 Ill. 174, it was sought to hold a corporation upon a new promise alleged to have been made by its secretary, and on page 179 this court said: "To prove a new promise it would be necessary to show some action on the part of the directors from which the promise or their liability can be clearly inferred. The mere certificate of their secretary that the amount was due on specified items would be insufficient to prove a new promise or to bind the company, unless it were shown that he had been empowered to adjust such claims generally or this one particularly."

In view of what has been said by the text writers and in the adjudicated cases upon the subject, we are of the opinion that David E. Town, as secretary, did not possess the implied power, as a matter of law, to make such certificate, and that for want of proof of the publication of the notice required by the statute the court was without jurisdiction to confirm said special assessment. Had the record shown that Town, as secretary, had been authorized by the board of directors to make such certificates generally or this one in particular, or that by reason of a long course of business he had authority to bind the corporation in the

foregoing particulars, we are of the opinion his certificate as secretary would be good, but as the record is barren of such proof we are forced to hold that he had no implied authority, from the fact, alone, that he was secretary of the corporation; to make such certificate.

The judgment of the superior court will be reversed and the case remanded.

*Reversed and remanded.*

Mr. JUSTICE FARMER, dissenting.

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THE PEOPLE *ex rel.* Isaac C. Lafferty *et al.* Appellants, *vs.*  
LEONARD FEICKE *et al.* Appellees.

*Opinion filed December 21, 1911.*

1. *QUO WARRANTO*—a plea in *quo warranto* must affirmatively show jurisdiction to organize. A plea to an information in the nature of *quo warranto* which seeks to justify by showing the legal organization of the municipal body, must affirmatively show that jurisdiction existed in the proceeding by which such body was organized.

2. *SCHOOLS*—purpose of the provision for serving notice of proposed change of districts. The purpose of the statute in providing for service of notice in writing and a copy of the petition upon either the president or clerk of the board of directors of the school districts affected by the change of school districts proposed in the petition is to give the board an opportunity to be heard for or against the allowance of the petition, and the giving of the notice and serving of the copy of the petition is necessary to the jurisdiction of the trustees to act on the petition.

3. *SAME*—service of notice and copy of a petition by petitioner on himself, as clerk, is not sufficient. Where one of the petitioners for the formation of a new school district out of parts of three others attempts to give the notice and serve the copy of the petition upon himself, as clerk of the board of directors of one of the districts affected by the proposed change, there is no such service as is contemplated by the statute even though it may conform to the letter thereof, and the trustees are without jurisdiction to grant the prayer of the petition.

4. PROCESS—*when the service of process confers no jurisdiction.* Where one occupies a fiduciary or representative relation to a person or the subject matter to be affected by an action or proceeding and has some personal interest in such proceeding, either as a party or otherwise, antagonistic to the interests of those whom he represents, service of jurisdictional process upon him will not confer jurisdiction even though the statute may provide for service upon one occupying such relation.

APPEAL from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

V. F. BROWNE, State's Attorney, and HERRICK & HERRICK, for appellants.

INGHAM & INGHAM, for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court :

The State's attorney of DeWitt county, on the relation of Isaac C. Lafferty and the school directors of district No. 11 in said county, filed an information in the nature of a *quo warranto* in the circuit court of the said county against Leonard Feicke, James D. North and Joseph Kinnett, and against school district No. 107, of which the three persons named pretended to be school directors. The purpose of the information was to require the defendants to show by what right and authority they pretended to exercise the office of school directors and by what right said school district assumed to be a legally incorporated school district. To the amended information the defendants filed a plea which purported to set out all of the proceedings by which a school district was organized out of territory detached from school districts Nos. 10, 11 and 20, and also the calling and holding of an election in the said district No. 107, at which Feicke, North and Kinnett were declared elected school directors of the new school district. To this plea a demurrer was interposed and overruled. The plaintiffs elected to abide by their demurrer and their petition



was dismissed. The present appeal is prosecuted by plaintiffs below from the judgment overruling the demurrer and dismissing the petition and adjudging costs against relators.

The controversy in this case grows out of an attempt to organize a new school district out of territory belonging to three school districts. The territory composing the school districts affected was in three different townships. Districts Nos. 10 and 11 are wholly within township 21, north, range 4, east, which is known as Rutledge township. District No. 20 is partly in Rutledge township and partly in township 20, north, range 3, east, called Hart township, and partly in township 20, north, range 4, east, called DeWitt township. Three school districts and three townships were therefore interested in the formation of the proposed new district. The statute provides that when a new district is to be formed out of parts of other districts, a petition shall be filed with the clerk of the board of trustees of the township in which such territory is located, at least twenty days before the regular meeting in April, and also requires that a copy of the petition, with notice in writing signed by one or more of the petitioners, shall be delivered by one of the petitioners not less than ten days before the day on which the petition is to be considered, to either the president or the clerk of the school directors of the district that will be affected by granting the prayer of such petition. The plea filed by appellees sets out in detail what was done by the petitioners as a compliance with the statute in regard to serving a copy of the petition and written notice upon the three boards of school directors whose districts were affected by the proposed change. Leonard Feicke was one of the petitioners for the formation of the new district. He was also a school director and clerk of the board in school district No. 11, in Rutledge township. The plea shows that Feicke, as a petitioner, attempted to serve a copy of the petition and notice in writing upon the board of directors of district No. 11 by delivering to himself a copy

of said petition and written notice. In other words, the plea shows that the only service of the petition and written notice upon district No. 11 was a service by Leonard Feicke, as a petitioner for the formation of the new district, upon Leonard Feicke, clerk of the board of school directors of district No. 11, by delivering to himself the copy of the petition and notice set out in the plea. The only question discussed by counsel on either side is the sufficiency of the service shown by the plea upon the board of directors of district No. 11.

The statute contemplates a hearing before the trustees upon a petition for the formation of a new school district, and the purpose of requiring a copy of the petition and written notice to be served upon the president or clerk of the board of directors in each district whose territory is affected by the proposed change, is to afford an opportunity for the districts concerned to appear and present reasons for or against the allowance of such petition. The giving of this notice and serving a copy of the petition upon the president or clerk of the board of school directors of the districts affected is necessary to give the trustees jurisdiction to act upon the petition. In a plea to an information in *quo warranto* seeking to justify, it must affirmatively be shown that jurisdiction existed in the proceeding by which the municipal body was organized. (*Miller v. Trustees of Schools*, 88 Ill. 26; *Mason v. People*, 185 id. 302.) The law is well established that a party to a suit cannot serve his own writ. (*Filkins v. O'Sullivan*, 79 Ill. 524.) The reason for this rule is, that the party serving process should be a wholly disinterested person. (*Tallon v. Schempff*, 67 Ill. 472.) If such a practice were sanctioned there would be great danger of abuse and inducement to the person making the service to make a false return, and thereby put himself in a position to obtain judgment by default or some other undue advantage over the opposite party, who would perhaps not know anything of the proceeding until after

judgment had been rendered against him. The courts have therefore generally adhered, with great propriety and justice, to the rule that in no case can a person be both officer and party in the same proceeding. (*Woods v. Gilson*, 17 Ill. 218; *Gage v. Griffin*, 11 Mass. 181; *Morton v. Crane*, 39 Mich. 526.) In the case at bar we have a petitioner serving the only process provided by the statute to be served, upon himself. This service was in compliance with the letter of the statute but in violation of its spirit. Feicke's interest as a petitioner for the new district was antagonistic to his position as a member of the board of directors of school district No. 11. A service of notice by himself, as a petitioner, upon himself, as clerk of the board of school directors, cannot be held to be a compliance with the statute.

*Tallon v. Schempf*, *supra*, was a statutory proceeding for the purpose of appointing a commission of surveyors to locate a boundary line between the parties. The notice required by the statute was served by an interested party. It was held that the notice answered the purpose of a summons and that it could not legally be served by an interested party, and that such service did not give the circuit court jurisdiction to appoint a board of surveyors to locate a boundary line. The same question arose again in this court in *Lee v. Fox*, 89 Ill. 226, which was also a statutory proceeding to establish a boundary line by a board of surveyors, and the rule announced in the *Schempf* case was re-affirmed and followed.

If a party cannot serve his own process upon his adversary because of the danger of abuse, there is much greater reason for saying that he cannot serve it upon himself when his personal interest is antagonistic to his duty in the capacity in which he is served with process. Service of process against a corporation on an officer or agent whose relation to the plaintiff or the claim in suit is such as to make it to his interest to suppress the fact of service is unauthorized,

though the person served is within the terms of the statute authorizing the service. (*Atwood v. Sault Ste. Marie Light, Heat and Power Co.* 148 Mich. 224; 111 N. W. Rep. 747.) In *St. Louis and Sandoval Coal and Mining Co. v. Edwards*, 103 Ill. 472, this court held, on a bill by a director of a corporation and others, stockholders and creditors of the corporation, that service of summons by leaving a copy with the complaining director was a void service upon the corporation; that the director of the company upon whom the service was had being a complainant and personally interested, the corporation was not bound by service upon him. And in *St. Louis and Sandoval Coal and Mining Co. v. Sandoval Coal and Mining Co.* 111 Ill. 32, the same rule was announced, and it is there held that service of a summons on a corporation by leaving a copy with one of the complainants in the suit who was also an officer of the corporation is void.

In *Hemmer v. Wolfer*, 124 Ill. 435, a decree under which real estate of minors had been sold was called in question. Lorenzo E. Wolfer was the complainant and the minor owners of the real estate were defendants in the chancery proceeding under which the real estate had been sold. Wolfer, the complainant, was the step-father of the minor defendants and the said minors resided with him as members of his family. The service of process was "by leaving a copy for each of them at their usual place of abode with Lorenzo E. Wolfer, a member of the family of each of them, he being a person of the age of ten years and upwards, at the same time informing him of the contents thereof." This court held that the service was fatally defective and that the decree rendered thereon was void as to the minor defendants when called in question, even in a collateral proceeding.

In *Heppe v. Szczepanski*, 209 Ill. 88, a decree of sale was entered on petition of the executor to pay a balance due on the award of the widow. The widow, though not

a party to the record, was beneficially interested in the proceeding and her interests were antagonistic to her minor children, who owned the fee. Service was had upon the minor owners by leaving a copy with their mother and explaining to her the contents thereof. Sufficient facts appearing of record to put purchasers on inquiry as to the manner of service and the relation of the mother to the minor children, this court held the decree and sale were void for want of jurisdiction. The rule announced in these cases is sustained by decisions in other jurisdictions. *Buck v. Ashuelot Manf. Co.* 86 Mass. 357; *George v. American Ginning Co.* 46 S. C. 1; *Whitehouse Mountain Gold Mining Co. v. Powell*, 30 Colo. 397.

The rule to be deduced from these cases is, that where one occupies a fiduciary or representative relation to a person or subject matter to be affected by an action or proceeding, and such person has some personal interest in such proceeding, either as a party or otherwise, antagonistic to the interest of others represented by him, service of jurisdictional process on such representative will confer no jurisdiction, even though the statute expressly provides for service on one in such relation. Under the law the service upon Feicke is void, not because it was served by him, but because it was served upon him, as clerk of the board of directors of district No. 11, when he was a petitioner and had personal interests antagonistic to his duty as director and clerk of the board. The plea in this case attempting to justify did not, therefore, show a legal organization of school district No. 107, and the court erred in overruling the demurrer to such plea.

The judgment of the circuit court is reversed and the cause remanded, with directions to sustain the demurrer to the plea, and for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

THE CITY OF MARION, Appellant, *vs.* G. W. SISNEY *et al.*  
Appellees.

*Opinion filed December 21, 1911.*

SPECIAL ASSESSMENTS—*estimate mentioned in section 10 must be itemized as well as estimate mentioned in section 7.* The estimate required by section 10 of the Local Improvement act to accompany the ordinance when presented by the board of local improvements to the city council must be itemized substantially the same as the estimate required by section 7 of said act, and must substantially conform to such estimate as the same was originally made or as modified on the public hearing.

APPEAL from the County Court of Williamson county;  
the Hon. W. F. SLATER, Judge, presiding.

W. W. SKAGGS, City Attorney, (HOSEA V. FERRELL,  
and R. P. HILL, of counsel,) for appellant.

SAWYER & KIMMEL, for appellees.

Mr. CHIEF JUSTICE CARTER delivered the opinion of  
the court:

The county court of Williamson county sustained certain legal objections and dismissed the petition of the city of Marion asking for the confirmation of an assessment for paving certain streets. The city appeals.

The objections sustained stated that the estimates of the engineer as to certain sidewalks, the description of material for sewer pipes, combined curbs and gutters and false curbs and gutters, and for several other items, did not comply with the statute. The estimated cost of the entire improvement was over \$52,000, of which the portion objected to composed a large part.

Counsel for the city concede that if the estimate which must accompany the ordinance when presented by the board of local improvements to the city council must be itemized

substantially the same as the estimate required by section 7 of the Local Improvement act, then the objections here in question were rightly sustained. They insist, however, that the estimate required under section 10 of that act need not set out the quality or kinds of material in such detail as required in the first estimate under section 7; that the reasons for setting out all these details in the first estimate, as stated by repeated decisions of this court, do not exist with reference to the other estimate; that if the ordinance contains sufficient details there is no necessity of having those details repeated in the estimate. This argument furnishes its own answer, for, carried to its logical conclusion, there would then be no necessity for any estimate to be part of the petition if the ordinance set out all the details required in that estimate. The wording of the statute as to the two estimates is practically the same. Section 7 provides that the estimate to be prepared for the board of local improvements and made a part of the resolution "shall be itemized to the satisfaction of said board." Section 10 states that "an estimate of the cost of such improvement, as originally contemplated, or as changed, altered or modified at the public hearing, itemized so far as the board of local improvements shall think necessary," shall be filed, together with the ordinance and recommendation. The first estimate has been held by this court to be a necessary part of the record of the resolution. (*Jones v. City of Chicago*, 213 Ill. 92, and cases cited.) Section 9 provides that the recommendation of the board "shall be *prima facie* evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding, unless the court shall deem the same willful or substantial." Objectors claiming that the preliminary requirements of the statute have not been complied with must overcome the *prima facie* proof made by this recommendation of the board of local improvements. (*Yaggy v. City*

of *Chicago*, 192 Ill. 104; *Madderom v. City of Chicago*, 194 id. 572.) If, however, there was a substantial variance shown between the estimate and the ordinance it would defeat the confirmation of the assessment. (*City of Chicago v. Soukup*, 245 Ill. 634.) This court held, under the Local Improvement act as originally passed, that the estimate which accompanies the ordinance should conform to and be the same as the estimate made by the board of local improvements for the public hearing. (*City of Chicago v. Wilder*, 184 Ill. 397; *Berry v. City of Chicago*, 192 id. 154.) The decisions just cited also hold that while the estimate in the two sections must agree, it does not follow that they must bear the same date. It is plain, however, from the reading of these decisions, that it was intended to hold that one should be a substantial copy of the other. The law has since been amended so that the estimate as first made for the board of local improvements may be modified at the public hearing. Judged by the record before us, it appears that this case was heard in the trial court on the theory that the estimate attached to the petition was the same as the estimate made for the board of local improvements. Be that as it may, manifestly the legislature intended that the estimate required by section 10 should be substantially the same as that required by section 7, unless at the public hearing a change was made in the estimate, and then the estimate as finally adopted at the public hearing should substantially conform to the estimate attached to the petition filed in court.

The conclusion that we have reached makes unnecessary any discussion of the various points raised with reference to the estimate.

The judgment of the county court must be affirmed.

*Judgment affirmed.*



MYRA WALKER, Appellee, vs. W. E. TAYLOR, Admr.,  
Appellant.

*Opinion filed December 21, 1911.*

1. CORPORATIONS—*in Illinois a corporation organized solely to deal in real estate is unlawful.* In Illinois a corporation organized for the sole purpose of buying and selling real estate is unlawful, and such a corporation cannot exercise its powers in Illinois even though it is organized under the laws of another State.

2. SAME—*when corporation cannot acquire title through trustee.* A corporation organized solely for the purpose of buying and selling real estate cannot take title in Illinois either by a deed made directly to the corporation or to a third person as trustee for the corporation.

3. SAME—*effect of deed to a trustee for benefit of corporation organized to buy and sell real estate.* A deed to Illinois land made to a trustee for the benefit of a corporation organized to buy and sell real estate passes no title either to the corporation or the trustee, but the persons who subscribed and paid for the stock and with whose money the land was purchased acquire an equitable interest in the land and are entitled to protection as against creditors of the trustee.

4. EQUITY—*equity will look to substance of a bond and not to its form.* An instrument executed by a grantee, which recites at length that the land is held in trust for a corporation organized for the purpose of buying and selling real estate, that the money of the corporation has paid for the land and that the trustee is to make conveyances as directed by the corporation, will be regarded, in equity, as a declaration of trust although it is in the form of a bond.

5. ESTOPPEL—*when complainant is not estopped to maintain a bill for partition.* The facts that the complainant in a bill for the partition of unsold lands among the stockholders of a corporation which has been dissolved, signed the deed conveying the land to such corporation and that she is the executrix and sole devisee of the grantor in the deed, do not estop her from asserting that the deed conveyed no title because the corporation was organized to buy and sell real estate, where the bill asks for no relief the complainant would not have been entitled to had the bill been filed by any other stockholder.

APPEAL from the Circuit Court of Rock Island county;  
the Hon. F. D. RAMSAY, Judge, presiding.

PEEK & DIETZ, for appellant.

GEORGE W. WOOD, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court :

This is an appeal by appellant, who was the defendant below, from a decree of the circuit court of Rock Island county granting the relief prayed in a bill in chancery filed by complainant below, Myra Walker, and Myra Walker as executrix of the last will and testament of George W. Walker, deceased.

The material facts out of which the litigation arose are as follows: On the 15th day of April, 1890, George W. Walker, husband of Myra Walker, was the owner of certain real estate near the city of Moline, a part of which is involved in this litigation. On the day mentioned he and his wife executed and delivered to Frank W. Gould, trustee, a warranty deed of conveyance for said land. The consideration paid for the deed was \$12,000, \$8000 of that amount being paid to Walker in cash. There was a mortgage of \$4000 on the land, and the conveyance was made subject to this mortgage, which was agreed to be paid by the grantee. On the same day the deed was executed and delivered to Frank W. Gould, the latter, together with John M. Gould and Charles M. Hill, executed an instrument reciting that they were held and firmly bound unto the East Moline Improvement Company, a corporation organized under the laws of the State of Iowa, with its principal place of business at Davenport, in said State, in the sum of \$12,000. The instrument recited that some question had been raised as to the right of the improvement company to hold and convey real estate in Illinois, and to avoid that question the board of directors of the East Moline Improvement Company had selected Frank W. Gould as trustee, to hold title to the land for the use of said

corporation. The instrument recited that the conveyance was made to Gould as trustee, but that he had not paid any of the consideration but the same was paid with the money of the corporation, and that Gould held the land for said corporation, to be conveyed to such party or parties and upon such terms and considerations as the corporation might from time to time direct, the proceeds to be turned over to the corporation. The instrument provided that if Frank W. Gould should faithfully perform the trust and upon reasonable demand account for and pay over to the corporation the proceeds of sales of any of said land, and convey and turn over to a successor in trust the title to the property and all money in his hands when required so to do, the instrument should be void. The East Moline Improvement Company was incorporated under the laws of the State of Iowa on the 11th day of March, 1890. The purpose of the incorporation was: "The general nature of the business to be transacted by this corporation shall be the acquiring, purchasing, holding, improving, building upon, leasing, selling and conveying real estate and improvements and buildings and other appurtenances belonging thereto, including the platting and laying out of real estate into town or city lots; also the acquiring, purchasing, holding, selling and transferring of mortgages, bonds, promissory notes, judgments and all kinds of negotiable paper, and also the loaning of the funds of the corporation. All and singular the above powers may be exercised in any of the States or territories of the United States of America." The corporation had an authorized capital stock of \$12,000, which was the consideration paid Walker for the land. It was paid by the subscribers to the stock of the corporation, who received stock representing the interest that they, respectively, had in the corporation. No other stock was ever issued by the corporation. Gould, the trustee, executed and filed for record June 4, 1891, a plat of part of the land, laying it out into lots, blocks,

streets and alleys as the East Moline addition to the city of Moline, and in 1898 he executed and filed for record a plat of another part of the land, laying it out into lots, blocks, streets and alleys as the Mineral Springs Park addition to the city of Moline. A portion of the land, as we understand it, has never been laid out into lots and blocks. Gould from time to time executed and delivered to purchasers of lots deeds therefor as directed by the corporation, and also executed contracts to other purchasers, agreeing to make conveyances when the lots were paid for. The money received was distributed to the stockholders of the corporation. The lots conveyed and contracted to be conveyed are described in the bill. Gould died intestate on or about the 20th of February, 1908, leaving Marcia L. Gould, his widow, and Florence Hale, his daughter and only descendant and heir-at-law. Appellant, W. E. Taylor, was appointed administrator of his estate. The bill sets out the names of the stockholders in the East Moline Improvement Company, the number of shares owned by them and the amount paid into the corporation. In September, 1898, the corporation filed with the Secretary of State of the State of Iowa a statement of the action of the stockholders of the corporation voting to dissolve said corporation. The resolution adopted by the stockholders recited that the company was completely dissolved, and that all parties holding any property of the company, in trust or otherwise, were authorized and directed to hold said property for and to account to the stockholders for their proportionate share. After the death of Gould his widow and daughter executed a quit-claim deed to George W. Walker for the land in controversy, being a part of the land described in the deed from Walker to Gould. This deed was executed March 27, 1908, and on the 7th day of April following, George W. Walker executed a declaration of trust, reciting the deed originally made by him to Gould as trustee, the death of Gould, and the deed to Walker

from his widow and daughter. The declaration recited that Walker held the land in trust for the parties contributing to its purchase, and their assignees, according to their respective interests, setting out the names of the parties and their proportionate interests. George W. Walker died on May 5, 1910. He left a last will and testament, in and by which he devised all of his property to his widow and appointed her executrix of the will. She, as a stockholder of the East Moline Improvement Company and as executrix and devisee, filed the bill in this case.

The bill alleges that the East Moline Improvement Company was organized wholly for the purpose of dealing in real estate, and that under the laws of the State of Illinois it had no power to buy and sell real estate and that a deed to it for real estate in this State is void. The bill further alleged that the deed from Walker to Gould was made for the purpose of evading the laws of this State in regard to corporations dealing in real estate in this State and was absolutely void; that the legal title to the land never passed from Walker but was in him at the time of his death; that the equitable title to the lots sold by Gould to parties prior to his death was in the grantees of the deeds or their heirs or assigns, and that parties who had contracted with Gould for the purchase of lots but had no deeds therefor had an equitable interest in said lots. The bill prayed that the plats made by Gould be confirmed; that all deeds made by him be confirmed in the grantees, and that the rights of the parties who had entered into contracts for the purchase of lots but who had not paid the full consideration therefor and received conveyances be ascertained by the court, and that the residue of the premises be partitioned between the complainants and the other equitable owners thereof, who were the persons who had subscribed and paid for stock in the East Moline Improvement Company. All parties alleged to be interested were made parties defendant to the bill. Appellant and the

widow and daughter of Frank W. Gould demurred to the bill. The demurrer was overruled, and appellant, as administrator of the estate of Frank W. Gould, answered the bill. The answer denied that Gould executed a declaration of trust, but alleged the instrument executed by him was a bond or writing obligatory for the performance of covenants, and that the remedy, if any, was at law. The answer denied the deed from Walker to Gould was void and that the title remained in Walker. The answer further averred that Gould was at the time of his death insolvent, and that appellant was appointed administrator of his estate and claimed the land in controversy as the property of Gould and liable to his creditors for the payment of their claims. Some of the other defendants answered the bill, but none of them denied its allegations or that the relief prayed should be allowed. After replications filed the cause was referred to the master to take the evidence and report his conclusions of law and fact. The master reported recommending a decree in accordance with the prayer of the bill, and after overruling exceptions filed by appellant the court entered a decree in accordance with the prayer of the bill and the recommendations of the master. The administrator of the estate of Frank W. Gould has brought the record here for review by appeal.

We think it abundantly shown by the record that the East Moline Improvement Company was organized for the purpose of buying the land from Walker, platting it into lots and blocks and selling them. We are warranted in inferring that the reason the company was organized under the laws of the State of Iowa was that such powers could not be conferred upon or exercised by a corporation in this State. The capital stock of the corporation was \$12,000. That was the consideration paid for the land, and the money to pay for it was received from the sales of stock. No business of any kind was done by the corporation except buying, platting and selling the Walker land.

In September, 1908, at a stockholders' meeting it was voted to dissolve the corporation, and a copy of the resolution adopted at the meeting was directed to be filed with the Secretary of State of Iowa. The corporation, therefore, for the purposes of this case must be treated on the same basis as if it had been organized for the sole purpose of buying and selling real estate. Such corporations are unlawful in this State and cannot acquire real estate. (*Carroll v. City of East St. Louis*, 67 Ill. 568; *Imperial Building Co. v. Board of Trade*, 238 id. 100; *People v. Shedd*, 241 id. 155.) It hardly requires argument to show that if the corporation could not acquire title to the land in controversy by deed directly to it, it could not do so indirectly by having the deed made to a third person for its benefit. The question is not whether a corporation organized for lawful purposes and having a right to hold real estate for certain purposes has exceeded its powers. In that case, as contended by appellant, the question whether the corporation had exceeded its powers could only be raised by the State. But here the company was trying by indirection to exercise powers it never did have, because the law forbade its organization with such powers. It follows that the East Moline Improvement Company never acquired title by virtue of the deed from Walker and wife, and as Gould represented the corporation he acquired no title. Those who subscribed and paid for stock issued by the illegal association and with whose money the land was purchased did acquire an equitable interest in the property. Their interests are entitled to be protected by a court of equity as against the creditors of Gould, who never had any interest in the land except to the extent of the stock he subscribed and paid for.

We do not see how there can be any question of estoppel here against Myra Walker, as contended for by appellant. It is argued that as she represents George W. Walker as executrix and sole devisee and herself signed the deed,

even though the corporation was unlawful and could not acquire title to the land, she and her husband knew this when the deed was made, and having received the consideration for it she cannot now be heard to assert that the deed did not divest George W. Walker of the title to the land. Mrs. Walker is seeking no advantage that would not have accrued to her if the bill had been filed by any of the other equitable owners of the premises. The wife and only heir of Gould after his death quit-claimed all interest in the land to George W. Walker, who thereupon signed a declaration of trust, in which he stated he held the premises for the benefit of those who had subscribed the money that had paid for it when he executed the deed to Gould. Walker and his wife were among the subscribers to the stock and Mrs. Walker is now the owner of forty-three shares. The bill alleged that those who had purchased lots from Gould and received deeds therefor were in equity the owners thereof and asked that their title be confirmed. As to those who had contracted for the purchase of lots but who had not paid the full consideration and received deeds, the bill asked that the balance due be ascertained, and upon payment thereof within a time to be fixed by the decree the master in chancery execute deeds to the purchasers. As to the residue of the property, partition was asked in accordance with the respective interests of the parties, represented by the shares of stock held and owned by them. A mere statement of the case shows nothing is asked contrary to equity and good conscience. As we have said, the bill might have been filed by any of the equitable owners of the land, and Mrs. Walker would have been entitled to the same relief as if she had filed the bill and no more. If she could not maintain the bill we do not see how any of the other stockholders could do so, and the result would be that the undisposed of land would go to the creditors of Gould, for whose benefit it is claimed by appellant. This would be both legally and morally wrong.



It is also contended by the appellant that the instrument signed by Frank W. Gould was not a declaration of trust but was a bond. We think it is both. It is in the form of a bond, but it recites at length that Gould held the land in trust for the stockholders in the East Moline Improvement Company; that it was not his land; that he paid no part of the consideration for it but that it was paid for with the money of said company. Equity looks to the substance and not to the form.

We are of opinion the decree was in accordance with the law and the evidence, and it is affirmed.

*Decree affirmed.*

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THE PEOPLE *ex rel.* A. E. Woods, County Collector, Appellee, *vs.* D. D. BABER, Appellant.

*Opinion filed December 21, 1911.*

1. DRAINAGE—*commissioners have no power to change classification, after hearing, without giving notice.* After the classification of lands in a farm drainage district is corrected upon the hearing of objections and confirmed as corrected, the commissioners have no power, without giving the land owners notice, to make any change in the classification.

2. SAME—*effect of an illegal attempt to change classification.* An attempt by farm drainage commissioners, without giving notice to the land owners, to change the classification after it has been corrected upon the hearing of objections and confirmed as corrected is void, and has no effect upon the classification as confirmed nor upon the taxes levied on the basis fixed thereby.

3. SAME—*when change of classification cannot be sustained as being a correction of clerical error.* A change by farm drainage commissioners in the classification as confirmed after correction on the hearing of objections cannot be sustained upon the ground that the clerk made a mistake in writing up the roll and that the change was made to conform to the original classification agreed upon, where there is no written evidence in the record to corroborate such claim but only the sworn statements of commissioners.

4. SAME—*classification as confirmed must stand until modified upon due notice.* The classification of lands as confirmed on the hearing of objections must stand as the basis for all future assessments until it has been changed or modified after due notice given as provided by law, and no illegal attempt of the commissioners to reduce the classification as to certain lands can change the legal assessment against such lands nor relieve the authorities of the duty of collecting it.

APPEAL from the County Court of Edgar county; the Hon. DAN V. DAYTON, Judge, presiding.

FRANK T. O'HAIR, for appellant.

R. S. DYAS, State's Attorney, (SHEPHERD & TROGDON, of counsel,) for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is an appeal from a judgment of the county court of Edgar county, rendered against appellant for a delinquent drainage tax levied by the commissioners of Drainage District No. 3 of the town of Kansas, in said county. To the application of the collector appellant filed a number of objections, all of which are intended to raise the same question.

The facts necessary to an understanding of the point at issue are as follows: The drainage district was regularly organized under the statute providing for a combined system of farm drainage. The commissioners made a classification of the lands of the district as required by the statute and fixed upon February 5, 1910, as the time for hearing objections to the classification, and in pursuance of notice appellant and other land owners appeared at the time and place of the said meeting and interposed objections to the classification of different tracts of land. After hearing objections the classification was corrected and affirmed. The classification as approved by the commissioners classified the lands of appellant on the graduated scale at 55. Appellant was dissatisfied and appealed from the classification, which

appeal was afterwards dismissed upon a stipulation of the parties. The assessment roll as confirmed also showed that certain lands belonging to Joseph Sallee were classified at 30, another tract at 50, another tract at 60 and a fourth tract at 30, and that a tract of land belonging to Sarah A. Oar was classified on the graduated scale at 50. On the basis of this classification the tax in question was extended. On the 13th day of February, 1911, the commissioners held another meeting in said district and changed the classification of the lands belonging to Joseph Sallee and Sarah Oar, by which changes the classification of said lands was substantially reduced on the roll. There was no notice given of the meeting at which said changes were made and none of the land owners were present. The effect in changing the classification on the Sallee and Oar lands was to reduce the amount of their assessment substantially one-half.

The appellant's objections presented the question to the county court whether the changing of the classification of the Sallee and Oar lands rendered the classification and assessment void. The county court held that it did not have such effect and rendered judgment against appellant's land for \$302.28, from which this appeal is prosecuted.

The reason alleged by the commissioners for changing the classification of the Sallee and Oar lands is that a mistake was made in writing up the original assessment roll. This alleged mistake, it is contended, was made by the clerk, and it is the claim of the commissioners that the classification to which the Sallee and Oar lands were reduced was the original classification agreed upon; but there is no written evidence in the record to corroborate this claim and it rests entirely upon the sworn statements of the commissioners. The statute does not confer upon the commissioners of the drainage district the power to change or modify an original classification for assessment purposes without giving notice. The land owners of the district are entitled to a hearing before a classification is made, which is to

form the basis of future assessments of taxes. When a meeting is held, upon notice, for the purpose of hearing objections and results in the confirmation of an assessment roll, every land owner has a right to assume that such assessment roll will remain as the basis of all levies thereafter to be made, until notice is given of an intention to correct, modify or re-classify the lands. It would be a dangerous power to confer upon commissioners the right to secretly meet and re-adjust and change a classification without giving any notice to the persons who are interested in their action. We are of the opinion that the order of the drainage commissioners of February 13, 1911, purporting to change the classification of the Sallee and Oar lands was utterly void for the want of power in the commissioners to thus change the assessment roll without notice and an opportunity of a hearing to the land owners of the district. In *People v. Cole*, 128 Ill. 158, this court held that the action of drainage commissioners in entering credits against certain drainage taxes after the same had been levied was illegal and void, on the ground that the drainage commissioners had no power to release lands within the district from any portion of the assessment based on the last classification. Changing the classification in the case at bar was, in effect, reducing the amount of taxes that had already been levied against the Sallee and Oar lands and were at that time a lien against the same. But we are also of the opinion that the action of the commissioners in attempting to change the classification of the Sallee and Oar lands had no effect either upon the assessment then standing against the Sallee and Oar lands or upon any other lands in the district. The action of the drainage commissioners in this regard being void, the result is that the Sallee and Oar lands are still liable for the taxes levied against them on the basis of the only legal assessment roll that has ever been made. All future assessments should be made upon

the basis of the original assessment roll until that roll is changed or modified upon due notice given as provided by law. Appellant's objections were therefore properly overruled. The illegal attempt of the drainage commissioners to permit some other land owner to escape the payment of his taxes affords no reason why the appellant should be relieved from the payment of taxes legally assessed upon his land. If the authorities charged with the duty of extending and collecting taxes against the Sallee and Oar lands neglect or refuse to perform their duty, the law will afford a remedy to compel the performance of such duty.

The judgment of the county court of Edgar county is affirmed.

*Judgment affirmed.*

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JAMES ROWLETT *et al.* Plaintiffs in Error, *vs.* WILLIAM H. MOORE *et al.* Defendants in Error.

*Opinion filed December 21, 1911.*

1. WILLS—*wife of executor named in a will is an incompetent witness.* The wife of the executor named in a will is not a competent subscribing witness, and if there is but one other subscribing witness the will is invalid and cannot be probated, even though the person named as executor executes a written renunciation. (*Fearn v. Postlethwaite*, 240 Ill. 626, adhered to.)

2. SAME—*when an objection to competency of subscribing witnesses is made in apt time.* An objection to the competency of the wife of the executor as a subscribing witness is made in apt time where it is urged before she testified and at intervals during her testimony, which the court admitted subject to the objection but without ruling thereon until after her testimony was given, when the objection was sustained and the testimony stricken out.

3. SAME—*amendment of 1911 to section 8 of Wills act is not retroactive.* Section 8 of the Wills act, as amended in 1911, making the husband or wife of any devisee or beneficiary competent to witness the will, cannot be given retroactive effect notwithstanding the language of the act, since to apply the act to wills which have become effective by the death of the testator before

the act took effect would be to disturb the vested rights of devisees and heirs, which attach at the time of the testator's death.

4. *SAME—will invalid when testator dies cannot be validated by subsequent statute.* A will which is invalid at the time testator dies cannot be made valid by a statute passed subsequent thereto.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. E. M. MANGAN, Judge, presiding.

ROBERT E. PENDARVIS, for plaintiffs in error.

C. VANALEN SMITH, (EASTMAN & WHITE, of counsel,) for defendants in error.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is a writ of error sued out to review a judgment of the circuit court of Cook county refusing the probate of the last will of Levi Moore, who died testate on the third day of May, 1906. The circuit court refused to admit the will to probate for the reason that Kittie Edna Koethe, one of the subscribing witnesses, was at the time she subscribed said will as a witness the wife of Aaron C. Koethe, who was by the testator nominated as the executor of his will. The sole question presented for our consideration is the correctness of this ruling.

It appears from the record that soon after the death of the testator Aaron C. Koethe presented a petition to the probate court of Cook county and procured an order admitting said will to probate; that the executor qualified and entered upon the administration of the estate and continued to discharge the duties of executor until March, 1910, when it was discovered that the order admitting said will to probate was irregular and invalid for the reason that proper notice had not been given to three of the heirs-at-law of the testator. On March 15, 1910, Aaron C. Koethe presented a second petition to the probate court asking that the former order admitting said will to probate be set aside.

On March 21 an order was entered in the probate court vacating and setting aside the probate of the will which had been entered on July 30, 1906. Thereupon plaintiff in error Charlotte Ann Rowlett, as an heir-at-law of the testator and one of the devisees under his will, presented her petition to the probate court asking that said will be admitted to probate, and with said petition presented the written renunciation of Aaron C. Koethe, nominated in said instrument as executor. Defendants in error appeared in the probate court and filed objections to the probate of said instrument, and specified in said objections the incompetency of Kittie Edna Koethe as one of the reasons why the instrument should be denied probate. A hearing in the probate court resulted in an order refusing to admit said instrument to probate, from which plaintiffs in error appealed to the circuit court, where another hearing was had with the same result, and it is the judgment of the circuit court refusing probate to said will that is brought into review by this writ of error.

The first and most important question presented by this record is the competency of the wife of the executor named in such will, as a witness to the due execution thereof. In the late case of *Fearn v. Postlethwaite*, 240 Ill. 626, the precise question here involved was presented and decided. The *Postlethwaite* case cannot be distinguished from the case at bar. There, as here, the only question before the court was whether the wife of the executor nominated in the will was a competent witness to the execution of the will, and upon a full review of the authorities the conclusion was reached that a will attested by the wife of the executor was not well executed where there was only one other witness thereto. We do not see how a re-examination of this question at this time could be of the least possible benefit either to the parties immediately concerned or to the legal profession. There is nothing presented in the case at bar that tends to weaken our confidence in the correct-

ness of our former decision. We could not hold that Mrs. Koethe is a competent witness to the will in this case without overruling the *Postlethwaite case*.

Plaintiffs in error contend that even if Mrs. Koethe was an incompetent witness the question is not properly preserved for our review. The contention on this point is that the objection to her competency was not made in apt time. The defendants in error have filed a supplemental abstract, which shows that objection was made in the court below to the testimony of Mrs. Koethe on the ground that she was incompetent for the reason that she was the wife of the executor at the time she subscribed to the will. The relationship of the witness to the executor had been brought out by the testimony of Miss Putzier. The court, however, was not disposed to rule on the objection but heard all of Mrs. Koethe's testimony subject to the objection made, which was repeated by counsel several times while she was on the stand. Counsel for defendants in error insisted on the objection and stated to the court that they did not want to be understood as waiving anything, and the court indicated to counsel that the objections would be properly preserved. Afterwards the objections were sustained by the court and all of the evidence of Mrs. Koethe was stricken out. We do not see how, under the facts shown by the supplemental abstract, counsel for the defendants in error could have been more persistent and diligent in protecting the rights of their clients than they were, without placing themselves in an antagonistic position to the trial court. The question of the competency of this witness is properly preserved for review by the objections and exceptions of plaintiffs in error to the ruling of the court in striking her testimony out of the record.

In May, 1911, the legislature passed an act amending section 8 of the Wills statute so as to make the husband or wife of any devisee or beneficiary under the will competent to witness such will, and providing that such will shall be



valid as to all devises or interests other than the devise or interest given to the husband or wife of such subscribing witness. To said amendatory act a provision is added, as follows: "This act being remedial in character shall be construed liberally and shall apply to cases arising on wills of persons deceased, prior to the adoption of this act, but not finally adjudicated." (Laws of 1911, p. 538.) Plaintiffs in error contend that this act should be applied to the will now under consideration, notwithstanding the will was made and the testator died several years before the act became effective. This contention cannot be sustained. Upon the death of a testator property rights become fixed. If he leaves a valid will the title of the legatees and devisees becomes a vested right, and if the will is invalid his property passes, under the statute, to his heirs by descent and their title becomes vested. The legislature cannot, therefore, affect the validity of wills executed by testators who have died before the statute takes effect. A will that is invalid when the testator dies cannot be made valid by a statute passed subsequent thereto. (*Remington v. Bank*, 76 Md. 546; 25 Atl. Rep. 666; Page on Wills, sec. 22.) The moment the testator or intestate dies the rights of the devisees or heirs attach, for the title is then already vested, and no change in the law thereafter made can disturb such vested rights. (*Sturgis v. Ewing*, 18 Ill. 176.) The same doctrine is held in many other cases. (*Noakes v. Martin*, 15 Ill. 118; *McDaniel v. Correll*, 19 id. 226; *Deininger v. McConnel*, 41 id. 227.) To construe the act in question so as to give it a retroactive effect would, in effect, be to recognize the power of the legislature to deprive persons of property rights without due process of law, which the constitution forbids.

There being no error in this record the judgment of the circuit court of Cook county is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* I. N. Cooley, County Collector, Defendant in Error, *vs.* SARAH L. SCHENCK, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. TAXES—*drainage record is the only legal evidence of action of commissioners.* The record which the statute requires to be kept of the proceedings of farm drainage commissioners is the only legal evidence of their actions.

2. SAME—*official action shown by drainage record is presumed to have been within limits of district.* Official action shown by the record of farm drainage commissioners will be presumed to have been within the limits of the district where the record is silent upon the point, and the burden of showing the contrary, in a proceeding to collect the drainage assessment, is upon the party raising the objection.

WRIT OF ERROR to the County Court of Edgar county ;  
the Hon. WALTER S. LAMON, Judge, presiding.

F. C. VANSSELLAR, for plaintiff in error.

FRANK T. O'HAIR, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court :

The objection to the drainage tax assessed under the Farm Drainage act involved in this appeal was, that there was no legal classification of the lands of the district because the meeting at which the classification was made was not held within the boundaries of the district and the record of the commissioners failed to show any legal meeting for the purpose of classification held within such boundaries. The evidence to sustain this objection consisted of certain portions of the drainage record showing the meetings of the commissioners and their action but not showing where the meetings were held. No parol testimony was heard and there was therefore no evidence as to where the meetings were held. A record of the proceedings of drain-

age commissioners is required to be kept, and such record is the only legal evidence of their action. Official action shown by such record will be presumed to have been within the limits of the district, within which, only, official power can be exercised. The burden of showing the contrary in this case was on the plaintiff in error, but she offered no evidence to sustain it.

*Judgment affirmed.*

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FRANK MARLOW, Appellee, vs. JOSEPH W. RICH,  
Appellant.

*Opinion filed December 21, 1911.*

1. PRACTICE—*when no exception is necessary.* Whether the proof in a suit to enjoin the obstruction of a street corresponds with the allegations of the bill is a question of law, and no exception to the master's report is necessary to raise such question. (*Dorn v. Farr*, 179 Ill. 110, and *Thornton v. Commonwealth Loan Ass'n*, 181 id. 456, distinguished.)

2. DEDICATION—*a dedication may be by parol.* A dedication of a street to the public may be evidenced by acts and declarations without any writing, and so far as an agreement concerns the dedication of a street to the public it is not affected by the Statute of Frauds.

3. SAME—*what tends to prove dedication of street.* Proof that the grantor, when selling a tract of land, verbally agreed, for an independent consideration, to leave a strip of adjoining land open for a public street, and that such strip was left open, was fenced on both sides and graded and used by the public, tends to show a dedication to the public, and there is such performance and change of situation of the parties as takes the contract out of the Statute of Frauds. (*Schneider v. Sulzer*, 212 Ill. 87, distinguished.)

APPEAL from the Circuit Court of Tazewell county;  
the Hon. T. N. GREEN, Judge, presiding.

POTTS & CONAGHAN, and J. M. POWERS, for appellant.

JAMES A. CAMERON, and O. A. SMITH, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal from the decree of the circuit court of Tazewell county enjoining the appellant and George Rich from obstructing the strip of land sixty-six feet wide between two tracts of land conveyed by appellant and George Rich and their sister, Barbara Rich, to appellee, which the bill of appellee alleged they had agreed to leave open as a passageway or street, and ordering the said Joseph W. Rich and George Rich to remove from said strip the house and other improvements and obstructions placed thereon.

The principal question of fact was whether a contract was entered into between the complainant and the defendants when he agreed to purchase the two tracts, that the strip of land between them should be left open and dedicated as a street to the village of Deer Creek. That there was such a contract was affirmed by the complainant and denied by the defendants, and the evidence was in irreconcilable conflict. It would not benefit anyone to repeat or analyze the testimony of the witnesses. After reading it we find no reason to disagree with the conclusions of the special master in chancery and the chancellor, and we think the undisputed facts make the testimony that there was a contract more probable than the contradictory testimony. In brief, the material facts as found are, that in December, 1903, the appellant and his brother, George Rich, and sister, Barbara Rich, owned a tract of twenty acres in the village of Deer Creek between the portion platted in lots and blocks and the north line of the village, and also owned a farm adjoining that tract on the north. The complainant negotiated with the appellant, acting for himself and his brother and sister, for the purchase of a portion of that tract, and the appellant refused to sell the strip in question because he wanted to reserve it for a street and an outlet from the farm. Main street ran north and south and its

north end was the south end of the strip. It was agreed that the complainant should buy about five acres on the west side of the strip and one acre on the east side at the north end, and was to pay \$225 an acre and \$95 for having the strip kept open as an extension of Main street. The parties looked over the premises, and at that time there was a roadway on the strip used by the owners and by others with their permission. A written contract was then entered into for the purchase of the two tracts, but the exact size or dimensions were not known and they were to be measured for the purpose of ascertaining the exact number of acres. The tracts were measured and stakes were set at the corners. The tract which would be west of Main street extended north contained four and two-thirds acres and measured 555 feet north and south across the entire twenty-acre tract. The one-acre tract was 189 feet north and south, extending from the north side of the twenty-acre tract and opposite the north part of the larger tract. The complainant refused to buy the one-acre tract unless Main street was extended north and kept open as a road or street. A deed was executed by appellant and his brother and sister to complainant conveying the two tracts, which were described by metes and bounds, the description of the larger tract commencing at the intersection of Green street and Main street and the other commencing 366 feet north of Green street on the east line of Main street, which was a point in the tract where no street had been laid out but which would be on the east line of Main street when extended. Reed & O'Brien's addition was afterward laid out on the twenty-acre tract south of the one-acre tract, and Main street was extended north by the plat to the southwest corner of the one acre bought by complainant, leaving that part of the strip 189 feet long north and south between the two tracts bought by the complainant, which is the part in dispute. After the purchase complainant built a house and barn on the one-acre tract and a cane mill opposite on

the larger tract. He set out trees on each side of the strip of land in dispute and the village at different times mowed the grass and graded the roadway, and it was used as a road until 1908, when it was obstructed.

The first complaint is, that the chancellor struck from the files the exceptions of the defendants to the report of the special master. An order had been entered that the objections filed with the master should stand as exceptions to his report, and when exceptions were afterwards filed they were stricken from the files. Counsel feel that by such action they were deprived of the right to present the question whether the proof corresponded with the allegations of the bill or was variant therefrom. The bill alleged the making of a parol contract, and counsel contend in one part of the argument that the proof did not agree with that allegation because the contract for the street was in writing; in another part that it was verbal and ceased to exist because it was not put in the written contract, and again that the contract could not be enforced because it was verbal and subject to the Statute of Frauds. There was some very indefinite testimony that there was something about the street in the written contract, but a witness who gave testimony of that kind had testified to the contrary in a previous trial, and the evidence for the defendants was that nothing was said about the matter in the writing. The consideration in the deed included \$95 more than the price agreed upon for the land, but that was not a contract between the parties. It does not appear to us that there was a written contract about the street, but the appellant was not affected by the ruling for the reason that no exception was necessary to raise the question whether the proof conformed to the allegations of the bill. That was a question of law, and it is not necessary to except in order to have such a question considered. (*Hurd v. Goodrich*, 59 Ill. 450; *Hayes v. Hammond*, 162 id. 133; *VonPlaten v. Winterbotham*, 203 id. 198.) In the case of *Dorn v. Farr*, 179

Ill. 110, a note was offered in evidence before the master and the objection did not point out or suggest any variance from the note described in the bill. This was necessary and the question of variance was not presented to the chancellor in any way. In *Thornton v. Commonwealth Loan Ass'n*, 181 Ill. 456, the objection was to the allowance of amounts paid for taxes and insurance and the appellant did not except to the allowance of them, which is necessary where an account is stated. On the day that the decree was entered, the defendants, by leave of the chancellor, filed an amendment to their answer, setting up for the first time the Statute of Frauds, making a new issue different from the questions before the special master. Disregarding the question whether this should have been done while the case was before the special master, there was such performance of the contract and such change in the situation of the parties that the Statute of Frauds could not apply. So far as the agreement to dedicate the street to the public was concerned, it was not affected by the Statute of Frauds because a dedication may be by parol. It may be evidenced by acts and declarations without any writing, (*Mann v. Bergmann*, 203 Ill. 406,) and the street was open, fenced on both sides and graded and used by the public, which tended to prove dedication.

In *Schneider v. Sulzer*, 212 Ill. 87, relied upon by appellant, the alleged agreement to pave a part of a street when opened was not a consideration for an agreement to dedicate it, while in this case the evidence showed an independent consideration for the promise.

We have considered all questions affecting the substantial rights of the parties and do not discover any reason for reversing the decree.

The decree is affirmed.

*Decree affirmed.*

LOUIS LIVINGSTON, Defendant in Error, vs. HONORAH  
MOORE, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*entire record is open for review on a writ of error.* Whether the trial court erred in declining to grant an appeal from a certain order denying a motion for new trial need not be determined when the case is subsequently brought up on writ of error, as every question is open for review on writ of error which could have been raised on the record on the appeal.

2. EJECTMENT—*what sufficient to establish title in purchaser at execution sale.* In an action of ejectment by the purchaser at the execution sale against the defendant in execution it is not necessary that the plaintiff show title from the government or from a common source with the defendant, but it is sufficient if he shows a valid judgment and execution and a sheriff's deed to himself, as he thereby establishes in himself whatever title the defendant had.

3. JUDICIAL SALES—*neglect of sheriff to pay \$1000 to defendant for a homestead estate does not invalidate sale.* Where indivisible homestead premises worth more than \$1000 are sold on execution the statute makes it the duty of the sheriff to pay over to the execution defendant the \$1000 for her homestead estate, and if the execution plaintiff pays over the money to the sheriff for the defendant the sale is not invalidated nor the plaintiff's right to a deed affected by the fact that the defendant may have refused to accept the money or the sheriff neglected to pay the money to the defendant until after the plaintiff had begun an ejectment suit.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. SAMUEL C. STOUGH, Judge, presiding.

This was an action of ejectment commenced by the defendant in error in the circuit court of Cook county against the plaintiff in error to recover in fee certain premises situated in the city of Chicago. The general issue was pleaded, and upon the cause being called for trial the defendant failed to appear in person or by attorney, and the issues having been submitted to a jury, a verdict was returned in favor of the plaintiff, upon which verdict the court rendered judgment. Thereupon the defendant moved the court



to set aside the judgment and to grant a new trial, which motion was overruled, and the defendant has sued out this writ of error to review the action of the trial court in denying said motion.

The plaintiff, to show title in himself, offered in evidence a judgment of the circuit court of Cook county in his favor, against the defendant, for the sum of \$1864.40, and an execution issued thereon by the clerk of the said court to the sheriff of Cook county. The return showed that said execution had been levied upon the premises described in the declaration; that the sheriff had duly advertised said premises for sale under said execution; that the plaintiff had purchased said premises at such sheriff's sale for the sum of \$1978.51, and that a sheriff's deed was executed to the plaintiff after the period of redemption had expired. It also appeared from the return of the sheriff that the premises were the homestead of the defendant; that the sheriff caused the same to be appraised by commissioners, who reported the same were worth more than \$1000 and that they were not susceptible of division, and that they were of the value of \$7500; that the sheriff thereafter delivered a copy of said appraisement to the defendant, with a notice thereto attached that unless the defendant should pay to him the surplus over and above \$1000 on the amount due on said execution within sixty days thereafter, said premises would be sold by him to satisfy said execution. The appraisement was had, and a copy thereof, with the notice aforesaid, was served on the defendant sixty days prior to the sale of the said premises to satisfy said execution. It further appears that after the payment of the costs and expenses of sale the sheriff reported that he paid the amount remaining in his hands to the attorney of the plaintiff in full satisfaction of said execution, and that the plaintiff, by his attorney, paid to the sheriff the sum of \$1000 in cash with which to pay and satisfy the homestead right of said defendant in said premises.

L. H. CRAIG, for plaintiff in error.

RICHARD H. PETERSON, for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

The defendant prayed an appeal from the order of the court overruling her motion to set aside the judgment and grant a new trial, which prayer for an appeal was denied, and the action of the court in that regard has been assigned as error. The defendant had made a motion to set aside the judgment and grant a new trial at an earlier day of the term, based on different grounds from the motion the overruling of which was sought to be reviewed by appeal, and it seems to have been the view of the trial court that if the defendant desired to review its action in refusing to set aside the judgment and grant a new trial an appeal should have been prosecuted from the order of the court in overruling the first motion, and for that reason declined to grant an appeal from the order overruling the second motion. Whether the court erred in declining to grant the defendant an appeal from its second order overruling the motion to set aside the judgment and grant a new trial need not be now determined, as the entire record is now before us for review upon this writ of error, and every question has been raised upon this record which could have been raised by the defendant had an appeal from said order been granted.

It is next contended that the court erred in rendering judgment against the defendant, as it is said the plaintiff did not show a connected chain of title in himself from the general government or from a common source of title with the defendant. It was not necessary that the plaintiff show a connected chain of title in himself from the general government or from a common source of title with the defendant, as the rule is well settled in this State that where the purchaser at an execution sale in an action of ejectment

against the defendant in execution shows a valid judgment and execution and a sheriff's deed to himself, he has established title in himself to whatever title the defendant had in the premises. (*Ferguson v. Miles*, 3 Gilm. 358; *Hayes v. Bernard*, 38 Ill. 297; *Osgood v. Blackmore*, 59 id. 261.) In the *Ferguson case*, on page 365, it was said: "The law is, that in an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution the defendant cannot controvert the title. The plaintiff is only required to produce the judgment, execution and sheriff's deed." In *Hayes v. Bernard*, *supra*, on page 301: "It is the general rule, when a defendant in execution, when land has been sold thereunder, is sued in ejectment by the purchaser under the execution to recover the possession, he cannot dispute the plaintiff's title. The books are full of cases conceding this proposition. (*Ferguson v. Miles*, 3 Gilm. 358; *Jackson ex dem. v. Graham*, 3 Caines, 188; *Cheny v. Denn*, 8 Blackford, 552.) The doctrine of all the cases on this point is, that the purchaser comes into exactly such estate as the debtor had, and if it was a tenancy the plaintiff will be tenant also, and estopped in a suit by the landlord from disputing his right, in the same manner as the original tenant, who becomes *quasi* tenant at will to the purchaser." In *Osgood v. Blackmore*, *supra*, on page 264: "It is believed to be a rule, without exception, that when a plaintiff in ejectment seeks to recover land against the defendant in execution, or when it becomes necessary to rely on a sheriff's deed as a link in his chain of title, he is only required to produce a judgment, an execution thereon and the sheriff's deed for the premises. This rule is so familiar that it requires no citation of authorities in its support." See, also, *Gould v. Hendrickson*, 96 Ill. 599; *Anderson v. Gray*, 134 id. 550; *Keith v. Keith*, 104 id. 397; *Woods v. Soucy*, 184 id. 568.

It is finally contended that the sheriff's sale was invalid because the sheriff did not pay to the defendant \$1000 as

and for her homestead in said premises out of the proceeds of said sale. The statute is as follows: "In case the value of the premises shall, in the opinion of said commissioners, be more than \$1000, and cannot be divided as is provided for in this act, they shall make and sign an appraisal of the value thereof, and deliver the same to the officer, who shall deliver a copy thereof to the execution debtor, or to someone of the family of suitable age to understand the nature thereof, with a notice thereto attached that unless the execution debtor shall pay to said officer the surplus over and above \$1000 on the amount due on said execution, within sixty days thereafter, that such premises will be sold." (Hurd's Stat. 1909, chap. 52, sec. 11.) "In case such surplus, or the amount due on said execution, shall not be paid within the sixty days, the officer may advertise and sell the said premises, and out of the proceeds of such sale pay to such execution debtor the said sum of \$1000, and apply the balance on said execution." (Ibid. sec. 12.) The amount was paid to the sheriff by the plaintiff with which to pay the defendant for her homestead right in the premises, and the fact that the defendant, at the time the ejectment suit was commenced, had not received the money would not defeat the sale under the execution. It is manifest from the terms of the statute the duty devolved upon the sheriff, and not upon the plaintiff in execution, to pay to the execution debtor the \$1000 for her homestead, and the neglect of duty by the sheriff or the obstinacy of the defendant in refusing to accept the money could not defeat the sale and deprive the plaintiff of the right to a deed to the premises which would entitle him to possession.

Finding no reversible error in this record the judgment of the circuit court will be affirmed.

*Judgment affirmed.*

FREEMAN BEEMER, Appellee, vs. ADDIE M. BEEMER, EXTX.  
Appellant.

*Opinion filed December 21, 1911.*

1. WILLS—*what evidence not sufficient to show a lack of testamentary capacity.* Evidence on the part of the contestant in a will case falls short of showing a want of testamentary capacity where, at the most, it merely discloses that the testator was old and suffering from a cancer, which caused him extreme suffering.

2. SAME—*fact that man cries from pain is not an indication of an unsound mind.* A tendency to cry as the result of little or no provocation may be an indication of mental unsoundness in a man, but the fact that a man cries when suffering extreme physical pain is not an indication of mental weakness.

3. SAME—*what circumstance does not tend to show a want of testamentary capacity.* The fact that the testator devised to a daughter a tract of land he had contracted to sell to a third person is not evidence of mental unsoundness but rather the reverse, as it shows an intention to give the daughter the land if the purchaser did not fulfill his contract, or the proceeds thereof if the purchaser fulfilled his contract after the testator's death.

4. SAME—*when a decree setting aside will on verdict of jury must be reversed.* A decree setting aside a will upon the verdict of a jury finding that the testator was of unsound mind must be reversed, where, assuming as true the facts testified to on the part of the contestant, they are not sufficient to overcome the undisputed facts proven by proponents showing testamentary capacity.

APPEAL from the Circuit Court of Lee county; the  
Hon. O. E. HEARD, Judge, presiding.

CHARLES F. PRESTON, and A. H. HANNEKEN, for appellant.

WILLIAM H. WINN, and BROOKS & BROOKS, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

Appellee, Freeman Beemer, filed his bill in the circuit court of Lee county to set aside an instrument which had been probated as the last will and testament of his father.

Henry Beemer. To this bill the executrix and the remaining heirs-at-law and devisees were made parties defendant. Adelia Argraves defaulted, a guardian *ad litem* was appointed for the infant defendants, and all the remaining defendants answered. As grounds for setting aside the will the bill alleged the testamentary incapacity of the testator, and undue influence on the part of the widow and a son who was the chief beneficiary under the will. At the close of all the evidence the court instructed the jury that there was no evidence of undue influence, and that they should not consider the testimony offered on that question in making up their verdict. The jury found that the testator was not of sound mind and memory and that the writing offered in evidence was not his last will and testament, and the court entered a decree accordingly. From that decree the executrix has appealed.

But two grounds are urged for reversal: First, that the court erred in giving instruction No. 3 on behalf of contestant and in refusing to give instructions Nos. 2 and 3 asked on behalf of proponents; and second, that the verdict of the jury and the decree of the court are against the clear weight and preponderance of the evidence.

Instruction No. 3 given on behalf of contestant is in the exact language of an instruction approved in *Dowie v. Sutton*, 227 Ill. 183, and there designated as instruction 18, and was properly given. The substance of instructions Nos. 2 and 3 asked on behalf of proponents was given in other instructions in the series, and for that reason were properly refused.

The contention that the verdict and decree are against the clear weight and preponderance of the evidence presents a serious matter for consideration and will necessitate a discussion of the evidence.

Henry Beemer, the testator, died March 12, 1910, leaving surviving him his widow, Addie Beemer, the executrix of the will, and his four children: Freeman Beemer, the

appellee, and Adelia Argraves, children of a former wife, and Lee Beemer and Luella Bradley, children of Addie Beemer. He died seized of 201 acres of land in Wyoming township, Lee county, Illinois, worth \$30,000, and 320 acres of land in Deaf Smith county, Texas, (subject to a contract of sale to Franklin Beemer, a brother,) worth \$5000, and about \$11,000 in personal property. By his purported will he devised to his wife all his household goods and \$5000, stating that as he had already conveyed to her 320 acres of land in Deaf Smith county, Texas, worth \$5000, he deemed that to be a suitable and adequate provision for her. To his son Lee Beemer he devised his real estate in Lee county and all the personal property thereon. To his son Freeman, and to his daughters, Adelia and Luella, he bequeathed the sum of \$1000 each, and to his daughter Luella he also devised the 320 acres of land in Deaf Smith county, Texas. Of the residue he gave to his wife one-third in her own right and the remaining two-thirds to her as trustee, for the use and benefit of the children of his daughters, Adelia and Luella. The instrument further provided that in case any of his devisees or legatees brought suit to contest his will, the share devised or bequeathed to the one so contesting should be forfeited and he or she should receive nothing from the estate. The will named his wife and his son Lee as the executors. The son having refused to qualify, the widow is acting as sole executrix. The instrument was dated July 28, 1909. At the time of its execution Henry Beemer was seventy-six years of age. At that time he was living on his farm in Lee county but was not then actively engaged in farming, the land being leased. About a year before the execution of his purported will he became afflicted with a cancer under his tongue. It does not appear that he consulted any physician in reference to his ailment until some time in the spring of 1909, when the disease had made considerable progress. He seemed to be loath at first to admit that it

was a cancer. He consulted the local physician, Dr. A. W. Chandler, of Compton, who treated him for some time. He then consulted Dr. F. G. Arter, of Chicago, in the latter part of May, 1909, who treated him until some time in August following. His condition from the first seemed to be hopeless so far as the prospect of a cure was concerned, and as the disease progressed the testator suffered intense pain, particularly at the times when the medicines prescribed were administered. During the summer of 1909 he was able to be up and about the place as usual, went to Chicago on two or three different occasions while taking treatment with Dr. Arter, and went to Compton and Paw Paw, in Lee county, at various times. From April 1, 1909, up until the time of his death, being the period covered by the testimony, he was able to, and did, transact such business as it was necessary for him to transact. It was conceded by contestant that prior to April 1, 1909, Henry Beemer was of sound mind, and that it was only subsequent to that time that he became mentally incapacitated.

Thirty witnesses testified on behalf of proponents, including two of the attesting witnesses, and each of them expressed the opinion that the testator was of sound mind. One of the attesting witnesses, Frank Wheeler, was the assistant cashier of the State Bank of Paw Paw and had known Henry Beemer twelve or fifteen years. The other attesting witness, S. W. Carnahan, was about the same age as the testator and had known him since they were about twenty years of age. On the day the will was executed Beemer went to the bank and requested Wheeler to go to the office of C. F. Preston, the attorney who drew the will, and sign as a witness. He met Carnahan on the street in Paw Paw, and after conversing with him a while, and having inquired if he believed that he (the testator) was capable of transacting his own business, asked him to attest the will. The other witnesses consisted of the two physicians who had treated him for cancer since April 1, 1909,



a trained nurse in Dr. Chandler's hospital at Compton, two brothers and a nephew of the testator, Dennis Hirley and his wife, with whom the testator had boarded while in Chicago taking treatment from Dr. Arter, and various intimate friends and neighbors who had known him from five to forty years prior to his death. All of these witnesses had seen and conversed with testator, and some of them very frequently after April 1, 1909, and twelve of them had business transactions with him after that time.

H. L. Fordham, cashier of the First National Bank of Compton, testified that he had known Beemer all his life and that testator had deposited money in his bank. During April or March he consulted the witness in regard to a contract that he was giving a real estate agent to sell his land in Texas. On September 6, at testator's request, he prepared a bill of sale whereby his personal property was conveyed to his wife. In the month of September he acted as a commissioner appointed by the county court to take the testimony of the testator on a petition which testator had filed to perpetuate his testimony. In March, 1910, he was requested to go to testator's home, at which time the testator executed a release of a mortgage deed which he held to the lands of appellee in the State of Iowa. At that time the testator and appellee settled the indebtedness which the mortgage secured, in which settlement appellee gave testator a check and his note for \$120. The check was delivered to witness by testator, with the request that he deposit it in the bank and make out a certificate of deposit to him.

Dr. A. W. Chandler testified that he had been a practicing physician twenty years, during all of which time he had known Henry Beemer. After April 1, 1909, Beemer came to his office to consult him concerning a growth in his mouth, which witness ascertained, upon examination, to be a cancer, and which testator told him had been there for a year previous to that time. His physical condition at

that time was very good, considering his age. Testator came to his office for treatment every two or three days during the month of April. Witness saw him once or twice in the winter previous to February 17, and he saw him the last time on that date. At those times he saw him at his home. When he first saw Beemer the cancer was so enlarged that it involved the tongue, cheek and the glands, reaching down to the collar bone. At that time it had not affected him very much physically. That condition of physical strength continued about the same until some time in November, when he began to show the result of failure to assimilate his food. When witness first saw him he told him that the cancer could not be removed, and it was understood in their talk that if it could not be removed it would kill him. Witness testified that at the times he saw him since April 1, 1909, he believed him to be of sound mind.

Dr. F. G. Arter testified that he was a physician located in Chicago and was a cancer specialist. He first became acquainted with testator in May, 1909, at witness' office in Chicago. At that time he had a conversation with him concerning himself, the growth in his mouth and his general health, and made an examination of him and arranged to give him treatment. He saw him next on May 27, when he returned to Chicago and stayed for seven days. During that time he saw him every day, and on two days saw him twice. At that time the witness examined his mouth and tempered his medicine because the medicine used produced pain, and he had to ascertain what strength of medicine the testator could bear. After he left on June 3 he returned in a week or ten days and remained a few days at that time. He next saw him at his home on June 30, where the witness remained two days. He treated him while there, gave him medicine and examined him. He saw him again, and for the last time, on the 6th of August. His physical condition was not so good then as it had been, but it was

not very bad at that time. Witness conversed with testator each time he saw him. In the first interview Beemer contracted with him for the treatment witness was to give him and agreed upon what witness should be paid for his services. On all occasions witness considered him of sound mind, but testified that there were times when he was so worried that he believed he was temporarily incapable of transacting business.

Nearly all of these witnesses testified to the physical condition of Henry Beemer and to the pain which he was evidently suffering as a result of his affliction, and all of them testify, in detail, to his actions and to conversations they had with him.

On the part of the contestant eight witnesses testified on the question of mental capacity. Linn Argraves, a brother-in-law of Adelia Argraves, testified that he was thirty-six years of age and had been acquainted with Henry Beemer all his life. He saw testator walking around on the depot platform at Compton on May 22, 1909, and he went over to him and asked how he was feeling. He said he was feeling poorly and was going to Chicago to see a doctor. He was walking around and holding his head in his hands, and witness asked him to sit down on a truck with him, where they talked about different things. On being asked by witness if he were in much pain, testator said that at times he suffered untold agonies, and if he did not get relief pretty soon it would kill him or he would go crazy. That was the last time witness ever saw him to speak to him, although he noticed him around the house and in the yard when driving by his place. While he was talking with him on May 22 he formed an opinion that his mental condition was unsound. On cross-examination he stated that testator acted like a man who was suffering so much pain that he did not know what he was doing, and that he told him the pain was caused by a cancer in his mouth.

Rinear Miller, a brother of testator's first wife, testified that he had known him intimately since 1849. He visited him quite often after April 1, 1909, and the main conversation he had with him about his condition was at testator's home in the first week of June, 1909. Witness sat down on the side of the porch and testator came and sat down close beside him, leaned his head on the witness' shoulder, and, commencing to cry, told him about his condition, and said that the cancer was paining him so much that it was going to drive him crazy unless he could get some relief; that he couldn't do anything and he didn't know anything, and he could not endure the pain, it was so great. He asked testator a few questions about his business, and was told that his business was all settled up. He saw him two or three times after that, and formed the opinion that his mental condition was unsound.

Millard Beemer, a cousin of testator, testified that he had known him all his life, and lived as his nearest neighbor for a number of years but now lived in Compton. He saw him at his home a great many times from April 1, 1909, up until the time of his death, and each time he was there talked with him about his physical condition and about the cancer. Many times the testator would hold his face in his hands and say he was "awful bad;" that it pained him awfully; that if it did not get better soon it would kill him, and that he was nearly crazy. Sometimes when he was talking he would walk the floor and sometimes he would sit down. Witness saw him cry two or three times when he was talking about his condition. From these conversations witness testified that he had formed an opinion as to the testator's mental condition, and that he believed that he was at times of unsound and at times of sound mind. Witness took testator and his wife to Paw Paw on the day the will was executed, but could not say whether he was mentally sound or not on that day, as he did not see him have any of his spells.

Alvin Beemer, a son of Millard F. Beemer, testified that he was living on the farm adjoining Henry Beemer's place during 1909 and 1910. After April 1, 1909, he saw the testator frequently and talked with him. He had seen him hold his hand to his head and say the cancer hurt him; that it was just like sticking a knife into him, and he thought it would kill him or he would go crazy. Witness expressed the opinion that at times he was of sound mind and at times he was of unsound mind. He testified that he had seen the testator cry, and in his opinion he was of unsound mind at those times. On cross-examination witness stated that he believed testator was of unsound mind only when he cried. He had seen him cry when the cancer was bleeding and hurting the worst, and that he believed he was crying because of the pain he was suffering. At other times the witness believed he was of sound mind. He transacted business with him that summer, having sold him some straw and bought some wood from him.

Helen Argraves, the mother-in-law of Adelia Argraves, testified that she was a cousin of Henry Beemer and had known him all her life. She then lived in Sterling but had lived in and around Compton nine years before. On the 23d of July, 1909, she saw testator in his home. When she stepped into the house he arose from a couch on which he was lying, and she said, "How do you do, Henry?" and put out her hand to shake hands with him, but he only stared at her. The witness then said, "Don't you know me?" and he made no reply, and when she said she had come to see him because she had heard he was sick, he said, "Why, woman, my mouth is killing me; I am going crazy; I don't know anything; I don't neither eat or sleep," and stood there for a few minutes saying nothing more. He then went out of the door and sat down on the steps, and as she passed him when she departed he had his hands up to his face and was weeping. From what he said

and did on that occasion she formed the opinion that he was of unsound mind.

Stephen Parker testified that he had been acquainted with Henry Beemer three or four years, and was at his place in September, 1909, where the witness and his father were erecting a cement building for Lee Beemer. He was at work there three days and saw testator each day. Testator said the building would have been different if he was doing it. While the work progressed testator would sometimes tell them that they didn't use enough cement in the blocks, and sometimes he didn't like the gravel. One day he told them all about his cancer. He said it hurt him terribly at that time, and felt just as if his jaw was being pulled off. Witness believed he was of unsound mind because he said he was crazy with pain and cried when he was suffering pain. He first formed the opinion that he was of unsound mind the day before the building was finished, when Beemer got into an argument with an old man working there, named Klapper, as to whether he had attended Klapper's wedding.

William Parker, the father of Stephen Parker, testified that he had known testator for forty years. In September, 1909, he was at the testator's place assisting his son, Stephen, in laying cement blocks. While there he saw testator and believed him to be of unsound mind. He based his opinion on a conversation he heard between testator and Klapper. Testator had said to Klapper, "I was at your wedding one time," and Klapper said, "I guess not," and he said, "I was at John Miller's, and John was going down and I went with him." Klapper said that was not true, and testator said it was.

Frank Miller, a son of Rinear Miller and a cousin of appellee, testified that he had lived on a farm near Comp-ton for thirty-five years and knew Henry Beemer well. He saw him about the first of May, 1909, at the Chandler hospital and talked with him in regard to his trouble. Testa-

tor said he had come to see Dr. Chandler about his cancer; that it was giving him a great deal of trouble, and that he didn't think he would ever get well. Witness saw him also on July 23 at his home and asked him how he was feeling, and he said, "Awful bad," and, "I am crazy with pain; if I don't get this stopped pretty soon it will kill me." He cried at that time, and witness formed the opinion that he was of unsound mind. On cross-examination he stated that he talked with him that time about five minutes, and he then concluded that the testator was of unsound mind, and that he based his opinion upon that conversation.

The theory of contestant is, that as the disease with which Henry Beemer was afflicted progressed it gradually broke him down physically and mentally, so that on April 1, 1909, and subsequently, he was so unsound mentally that he was incapable of making a will. The actions and conversations of the testator described and detailed by each of the eight witnesses for contestant, and upon which were based the opinions that he was of unsound mind, were all the result of and concerning his disease and physical suffering. It is evident that during the period covered by the testimony the testator was greatly afflicted physically and at times his suffering was intense. As the disease progressed the ravages of the cancer extended to the exterior of the chin and throat, so that it became necessary to apply bandages. From the time that he first consulted Dr. Chandler and learned that the disease had progressed to the extent that it would be impossible to remove the cancer, the testator knew that he was stricken with a fatal disease and that he had but a short time to live. It is but natural that this knowledge should cause anguish, worry and mental depression, and it is evident from the testimony that it did so. But the evidence on the part of the contestant falls far short of establishing that degree of mental unsoundness which creates a lack of testamentary capacity. The most that can be said of it is, that it disclosed the existence of

extreme physical suffering, disease and old age. In order to sustain the allegation of want of testamentary capacity something more than this must be shown. *Waters v. Waters*, 222 Ill. 26.

Some of the witnesses testified that they sometimes saw the testator cry, and it is urged that this is an indication of mental unsoundness in a man. That is true when it is the result of little or no provocation or cause, but in this case there is no evidence that testator cried or showed any signs of weakness except at the times when he was suffering intense pain. It may be that it would have been more admirable had he borne his suffering with more Spartan-like courage and fortitude, but it would certainly be unreasonable to say because he gave voice to his physical pain by crying out and shedding tears that he was mentally unsound.

It is urged that as the testator, on April 15, 1909, contracted to sell his real estate in Deaf Smith county, Texas, to his brother, Franklin, and executed a contract of sale whereby he bound himself to convey the same on November 15, 1911, upon the payment of the purchase price therein named, and that he afterwards, on July 28, 1909, by his will devised this same real estate to his daughter Luella, he did not have the capacity to understand the nature, extent and amount of his property. It is contended that this devise is an indication that the testator could not remember the contract of April 15, 1909. If any importance at all is to be attached to this circumstance it might well be argued that it was an indication of mental soundness. By the contract of April 15 the testator merely agreed to make a conveyance of this land to his brother at a future time upon the payment of the purchase price. He still held the legal title. If the purchaser failed to comply with his part of the agreement the land remained the property of Henry Beemer if he should live, and if the failure to perform should occur after his death the title then passed to his devisee. Nor



would the daughter Luella be a mere trustee for the conveyance of the legal title and the devise to her be an empty one in case Franklin Beemer should perform his part of the contract after the death of the testator. In that event the proceeds of the real estate devised to Luella Bradley subsequently to the contract of sale would belong to her under the will. (*Wright v. Minshall*, 72 Ill. 584; *Covey v. Dinsmoor*, 226 id. 438.) By this devise the testator made it certain that in the event the purchaser failed to perform, the land would go to his daughter, and in the event the contract was fulfilled and the purchase price paid she would then receive the proceeds.

There is no evidence in the record which discloses the motive of the testator in making an unequal distribution of his property among his children. It was not shown whether this was on account of advancements theretofore made to the son and daughter of his divorced wife, who were bequeathed only \$1000 each, or for other reasons. Henry Beemer, if he was of sound mind, had the right to make any disposition of his property that he saw fit. If there was evidence in the record to indicate mental unsoundness then it would be proper to take into consideration the unequal distribution of the property, but under the state of this record the fact that the testator did make an unequal distribution has no weight.

During the time covered by the testimony, from April 1, 1909, until the time of his death, the evidence shows that the testator transacted business and apparently gave his personal attention to his business affairs. During the summer he hoed in the garden and did other work about the premises. He was able to be up and around until shortly before his death. About April 1 he settled with H. W. Steafbold for grain which he had sold to him. On April 15 he negotiated with his brother, Franklin, for the sale of the Texas land and executed a contract of sale.

During that spring he settled with Franklin Beemer for his share of the taxes upon a tract of land which he and Franklin owned jointly and upon which Franklin had paid the taxes. In May he contracted with Mrs. Hirley for his board while he would be in Chicago taking treatment from Dr. Arter, and at the same time contracted with Dr. Arter in reference to his charges for the treatment. In the fall he sold hay to Harvey L. Rhoads. During the summer he went to the blacksmith shop of Ernest Clemmons and had a point put on a plow shovel. On September 6 he executed and acknowledged a bill of sale of his personal property on the farm to his wife. On November 19 he had his testimony perpetuated upon his own petition. During the summer he purchased straw from Alvin Beemer, and on November 2 he settled with him for the rent of his farm and took a note from him for \$215. In January, 1910, he sold Alvin Beemer some wood. On March 4, 1910, in a settlement which was conducted personally between testator and appellee, he executed a release of a mortgage deed to the lands of appellee in the State of Iowa. In the settlement he took appellee's note for \$120 and a check for the balance due, which he gave to H. L. Fordham, cashier, with directions to deposit in the First National Bank of Compton. Each of the persons who transacted business with him testified that he was of sound mind, with the exception of appellee, who was an incompetent witness and did not testify, and Alvin Beemer, who says that at times he was of sound mind and other times he was not.

While we appreciate fully the weight which should be given to the verdict of the jury and the decree of the chancellor in cases of this kind, we regard the verdict of the jury as manifestly against the clear weight of the evidence. Assuming as true all of the facts testified to on the part of contestant, it is not sufficient to overcome the undisputed facts proven by the proponents of the will, and that being

true, the decree must be reversed. *Graham v. Deuterman*, 244 Ill. 124.

The decree of the circuit court is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

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JOHN HEITING, Appellee, vs. THE CHICAGO, ROCK ISLAND  
AND PACIFIC RAILWAY COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. RAILROADS—*a city may pass ordinance requiring fences for protection of persons.* If clause 26 of section 1 of article 5 of the Cities and Villages act were the only authority for the passage by a city of an ordinance requiring railroad companies to fence their tracks such an ordinance would have to be construed as applying only to fences for the purpose of turning stock, as the liability imposed by such clause is the same as that existing under the general laws of the State; but clause 27 of the same section supplements clause 26 and authorizes an ordinance requiring a fence as a protection to persons.

2. SAME—*when an ordinance requiring fences is intended for the protection of persons.* An ordinance containing in one section provisions with reference to lighting tracks, the speed of trains, the erection, maintenance and operation of gates, bells and safety appliances as well as substantial walls or fences, but containing no provisions as to cattle-guards, cannot be construed as merely requiring walls or fences to keep stock from getting on the track, but must be construed as requiring them for the protection of persons as well as property.

3. NEGLIGENCE—*when neglect to maintain fences is proximate cause of accident.* If it can reasonably be concluded from the evidence that the accident would not probably have happened except for the failure of a railroad company to fence its tracks, it follows that the neglect to fence is the proximate cause of the accident, unless some other disconnected cause, which could not have been foreseen by the exercise of ordinary care, has intervened.

4. SAME—*when question of proximate cause is for the jury.* If the facts and circumstances proven are such that men of ordinary judgment might reasonably arrive at different conclusions as to whether the presence of the fence which the defendant railroad company was required by ordinance to erect would have prevented

the injury to the plaintiff, who was a boy ten years and eight months old, the question is one which must be submitted to the jury; and the age of the boy is one of the circumstances to be considered by the jury in determining that question.

5. SAME—*what not essential to render negligent act the proximate cause of injury.* To render a negligent act the proximate cause of an injury it is not essential that the particular injurious consequences and the precise manner of their infliction be such as could have reasonably been foreseen, and it is sufficient if the consequences follow in unbroken sequence, without any intervening cause, if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from his act.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

M. L. BELL, for appellant.

JAMES C. MCSHANE, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The circuit court of Cook county rendered a judgment against the appellant in an action on the case for personal injuries. The Appellate Court affirmed the judgment and granted a certificate of importance and appeal to this court.

The appellant offered no evidence on the trial but asked the court to instruct the jury to return a verdict in its favor. The refusal of this instruction is the error relied upon for reversal.

The place where the injury to the appellee occurred was in the city of Chicago, and the negligence charged in several counts of the declaration was the failure of the appellant to maintain fences on the sides of its railroad in accordance with the terms of the city ordinances, of which several were pleaded in different counts of the declaration. No question arises out of the difference in the ordinances,

and they will be treated as if all the provisions of the various ordinances were parts of the same ordinance.

The appellant's railroad extended south and south-west from the center of the city to the southern limits, and at the place where the appellee was injured there were four tracks. The road-bed was three or four feet above the level of the ground. The two inside tracks were passenger tracks, and were a foot and a half or two feet higher than the outside tracks. On each side of the right of way was a ditch four or five feet wide, outside of which, on either side of the right of way, was a fence, consisting of posts with four or five strands of barbed wire. The plaintiff was a boy ten years and eight months old at the time of the accident and lived with his parents at the corner of Ninety-sixth and Peoria streets, five or six blocks east of the railroad. He attended school at the corner of Ninety-ninth and Throop streets, one block west of the railroad. Ninety-fifth street north and Ninety-seventh street south of Ninety-sixth street were opened and planked across the railroad. Ninety-sixth street was not open across the right of way, but where the end of the street abutted on the right of way the fence was torn down, and there was evidence tending to show that the wire and at least two of the posts were gone. On the day of his injury the plaintiff attended school in the forenoon and went home to lunch at noon. With several other boys he started from his home at about a quarter of one to go back to school. They went west on Ninety-sixth street, intending to cross the railroad and go through an opening which was in the fence on the west side, out upon Vincennes road, which is there adjacent to and parallel with the railroad, then to go south on Vincennes road to Ninety-ninth street and thence west to the school house. Just as the boys got upon the railroad the school bell rang, and at the same time a long freight train was coming from the north on the west track. Seeing that they could not cross in front of the train they began to

run south along the track, with the intention of reaching the Ninety-seventh street crossing before the train. The plaintiff was running along the west end of the ties on the west passenger track, when he stepped on some of the coarse gravel with which the track was ballasted and fell. He rolled down under the train and his foot was run over and had to be amputated.

The ordinances introduced in evidence over the appellant's objection required the railroad company to construct on each side of its tracks, and in such place with reference thereto as the city council should direct, except where public streets should intersect or cross the same, substantial walls or fences of such material, design, proportion and height as should be determined and approved by the mayor and commissioner of public works, and to erect and maintain gates and signal bells and other safety appliances, operated from towers or by other reliable means satisfactory to the mayor and commissioner of public works, for the purpose of giving due and timely warning of the approach of trains. The speed of trains was limited to a low rate until the walls or fences required by the ordinances should be erected, but the mayor and commissioner of public works were authorized to issue a permit to any railroad company to operate its trains at higher rates of speed than allowed by the ordinances whenever they were satisfied that such company was proceeding as rapidly as practicable to construct the walls, fences, etc., as required by the ordinances. The appellant applied for and obtained such a permit, and for many years before the accident availed itself of the right granted to railroad companies which had constructed the walls, fences, etc., required by the ordinances, to operate its trains at the higher rate of speed.

Two propositions are contended for by the appellant: that the ordinance requiring fences was not intended for the protection of persons, and that the defect in the fence

was not the proximate cause of the plaintiff's injuries. The validity of the ordinance is not questioned.

Paragraph 26 of section 1 of article 5 of the Cities and Villages act authorizes the city council to require railroad companies to fence their tracks and to construct cattle-guards and street crossings within the corporate limits, and for a failure to comply with any such ordinance imposes upon them the same liability for all damages the owner of cattle, horses or other domestic animals may sustain by reason of injuries thereto while on the railroad track as is imposed under the general laws of the State in relation to the fencing of railroads. Paragraph 27 authorizes the council to require railroad companies to put flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads. We recently held that the general laws of the State relative to the fencing of railroads did not impose upon a railroad company any liability for the death of a child going upon the track from an adjacent parallel highway by reason of the railroad company's failure to erect and maintain fences suitable and sufficient to prevent stock from getting on its railroad, as required by section 1 of the act in relation to fencing and operating railroads. (*Bischof v. Illinois Southern Railway Co.* 232 Ill. 446.) Since the liability imposed by paragraph 26 cited above is the same as that existing under the general laws of the State, the ordinance must be held not to have been intended for the protection of persons, if the only authority for its passage is to be found in that paragraph. Paragraph 27, however, also deals with the power of the city council with reference to railroads, and supplements the provision authorizing it to require railroad companies to fence against stock by authorizing it also to provide protection against injury to persons and property in the use of railroads. The provisions of the ordinance for the construction of walls or fences were such as would tend to security against injury

to persons as well as to property, and if paragraph 26 were not in the statute the power to pass the ordinance would be amply conferred by paragraph 27. The ordinance contains no requirement for the construction of cattle-guards, which would be necessary if the prevention of stock getting on the railroad were the purpose, but it does contain provisions in reference to lighting the track, the speed of trains, the erection, maintenance and operation of gates, bells and other safety appliances, all of which are designed for the protection of persons and not to keep stock off the track. These provisions are all contained in a single section, and it requires too great an effort of the imagination to believe either that all these provisions were intended to keep stock off the track and not to apply to persons, or that the requirements in regard to fences applied to stock only and the other requirements to persons. In the *Bischof case* we said that the question must be determined by what the legislature has said, and the legislature having fixed as the standard the erection and maintenance of a fence suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on the railroad, there was manifestly no requirement for a fence which would keep children off. That standard does not apply to an ordinance clearly intended in many of its provisions for the protection of persons against injury from the operation of railroads in the city. In our judgment the requirement of fences, as well as the other provisions of the ordinance, was for the protection of persons as well as property.

In accordance with the views which we have expressed in regard to the ordinance the negligence of the defendant must be assumed, and, the facts being undisputed, the sole remaining question is whether there is any reasonable ground for saying that the failure to fence was the proximate cause of the plaintiff's injury. If it can reasonably be concluded from the evidence that the accident would not probably have happened except for the failure of the ap-



pellant to fence its track, then it follows that the neglect to fence was the proximate cause of the accident, unless some other disconnected efficient cause which could not have been foreseen by the exercise of ordinary care has intervened. In the similar case of *Hayes v. Michigan Central Railroad Co.* 111 U. S. 228, the court, in discussing the very question now under consideration, said: "It is further argued that the direction of the court below was right because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*?—a cause which, if it had not existed, the injury would not have taken place,—an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate. (*Milwaukee and St. Paul Railroad Co. v. Kellogg*, 94 U. S. 469.) The rule laid down by Willes, J., in *Daniel v. Metropolitan Railroad Co.* L. R. 3 C. P. 216-222, and approved by the Exchequer Chamber (L. R. 3 C. P. 591,) and by the House of Lords, (L. R. 5 H. L. 45,) was this: 'It is necessary for the plaintiff to establish, by evidence, circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to.' And in the case of *Williams v. Great Western Railroad Co.* L. R. 9 Exch. 157, where that rule was applied to a case similar to the present, it was said (p. 162): 'There are many supposable circumstances under which the accident may have happened and which would connect the accident with the neglect. If the child was merely wandering about and he had met with a stile he would probably have been turned back; and one, at least, of the objects for which a gate or stile is required is to warn people of what is before them and to make them pause before reaching a dan-

gerous place like a railroad.' The evidence of the circumstances showing negligence on the part of the defendant, which may have been the legal cause of the injury to the plaintiff, according to the rule established in *Railroad Co. v. Stout*, 17 Wall. 657, and *Randall v. Baltimore and Ohio Railroad Co.* 109 U. S. 478, should have been submitted to the jury."

In the following cases, in each of which a recovery was sought for the injury or death of a child who went upon a railroad track not fenced as required by law, it was held to be a question of fact, to be determined by the jury according to the facts and circumstances shown by the evidence, whether a fence constructed as required by law would have prevented the children from going upon the tracks: *Keyser v. Chicago and Grand Trunk Railway Co.* 56 Mich. 559; *Ross v. St. Paul and Duluth Railway Co.* 68 Minn. 216; *Ellington v. Great Northern Railway Co.* 96 id. 176; *Mattes v. Great Northern Railway Co.* 95 id. 386. In all these cases the child injured was younger than the appellee here at the time of his injury; but in *Baltimore and Potomac Railroad Co. v. Cumberland*, 176 U. S. 232, the case was held to have been properly submitted to the jury although the boy injured was nearly two years older than this appellee. The age of the child injured is, of course, one of the circumstances to be considered by the jury in determining the question of proximate cause. The question of contributory negligence, as expressly stated by counsel for the appellant, is not raised, except as bearing upon the question of proximate cause.

The case of *Fesler v. Willmar and Sioux Falls Railway Co.* 85 Minn. 252, is strongly relied upon by counsel for the appellant as controlling this case. In that case the court, after a consideration of the facts shown by the evidence, arrived at the conclusion that the absence of the fence was not the proximate cause of the injury. No two causes are precisely alike. In cases involving quite similar

facts different courts have arrived at opposite conclusions. The question for our determination is whether there was any evidence requiring the submission of the question of proximate cause to a jury, and if the facts are such that men of ordinary judgment may arrive at different conclusions as to whether or not a fence would probably have prevented the accident, then the condition was such as required the submission of the case to the jury.

It is insisted that the proximate cause of the accident was the appellee's selection of the ends of the ties next the moving train as a place to run. It is true that this was the voluntary act of the appellee, but it was not an independent intervening cause which the appellant could not have anticipated. On the contrary, if the appellant was negligent in failing to fence its track as required by the ordinance, and by such negligence suffered children to come upon its tracks, it might by the exercise of reasonable diligence have anticipated that precisely such an accident would happen as did happen. It is not, however, essential to make a negligent act the proximate cause of an injury that the particular injurious consequences and the precise manner of their infliction could reasonably have been foreseen. If the consequences follow in unbroken sequence from the wrong to the injury, without any intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from the negligence. *Illinois Central Railroad Co. v. Siler*, 229 Ill. 390; *Ford v. Hine Bros. Co.* 237 id. 463.

In our judgment the facts were such as to require the case to be submitted to the jury, and the motion to direct the verdict was properly denied.

*Judgment affirmed.*

THE CITY OF MOLINE, Appellant, vs. NELSON H. GREENE  
*et al.* Appellees.

*Opinion filed December 21, 1911.*

1. EMINENT DOMAIN—*property already devoted to public use cannot, in general, be condemned for different public use.* Property already devoted to a public use cannot be condemned for a different public use unless there is express or implied statutory authority therefor.

2. SAME—*grant of power to condemn property under the Local Improvement act is general.* The grant of power to a city to appropriate property under the Local Improvement act is general, and the same rule of construction is applicable to it as applies to the general grant of the power of eminent domain to railroad corporations under the Railroads act.

3. SPECIAL ASSESSMENTS—*a city has no power to take land of a public library to widen street.* Neither the general power of a city to open, widen or alter its streets or other public grounds nor the power to appropriate land under the Local Improvement act authorizes a city, for the purpose of widening a street, to take land already devoted to public use as a public library.

4. SAME—*citizen and tax-payer may object to confirmation of assessment requiring taking of land of public library.* A citizen and tax-payer of the city, even though not a party to the proceeding, may appear and object to the confirmation of a special assessment for the purpose of widening a street by taking a strip of land from the abutting property, which includes land already devoted to public use as a public library, the title to which is held by the trustees of the library, who are not objecting.

5. SAME—*when petition must be dismissed.* If the city has no power to take a portion of the land required to widen a street, as provided in the improvement ordinance, the petition must be dismissed, regardless of any power the city may have to provide by another ordinance for a different improvement.

APPEAL from the County Court of Rock Island county;  
the Hon. R. W. OLMSTED, Judge, presiding.

G. A. SHALLBERG, City Attorney, (W. R. MOORE, of  
counsel,) for appellant.

PEEK & DIETZ, JAMES JOHNSTON, FRANK J. LANDEE,  
and WILLIAM A. MEESE, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court :

This is an appeal from a judgment of the county court of Rock Island county dismissing a petition of the city for a local improvement by special assessment. The special assessment was for the purpose of improving Fifth avenue, a street of said city running east and west, by widening it from 60 feet to 70 feet from Fifteenth street to Eighteenth street, and paving it. The widening was proposed to be done by taking a strip 10 feet wide from the property abutting upon the south side of the street. The Moline Public Library is situated at the south-east corner of Fifth avenue and Seventeenth street, and has a frontage of 160 feet on Fifth avenue and extends south 150 feet to an alley. Ten feet of the library property was proposed to be taken for the widening of the street. Upon the filing of the petition by the city, commissioners were appointed, as provided by section 14 of the Local Improvement act. They made a report in accordance with the provisions of section 15. Appellees, Nelson H. Greene and A. A. Crampton, who were not the owners of any property proposed to be taken or assessed and were not members of the library board but were residents and tax-payers of said city, filed objections. The only objection necessary to be referred to is, that the property of the library sought to be taken was public property already devoted to a public use and could not be condemned or taken for another public use. This objection was sustained and the petition dismissed. From the judgment sustaining the objection and dismissing the petition the city has prosecuted this appeal.

Appellant contends (1) that the property of the library was subject to be taken for the purpose of widening the street, which is a different public use from that to which it is now devoted; (2) that Greene and Crampton had no right to file objections to the taking of the property; and (3) that if they were authorized to file objections and the

property could not be taken, it was error to dismiss the petition as to the property other than the library property.

The library was established by an ordinance adopted in 1892 in accordance with the provisions of the statute. The property was purchased for \$10,000 and the money to pay for it was raised by subscription. The deed was made to the board of directors of the Moline Public Library of Moline, Illinois, and contained no conditions. A donation of \$40,000 was made by Andrew Carnegie for the construction of the building.

Conceding that the legislature has power to authorize public property devoted to one public use to be taken and appropriated to a different use for the public benefit, the question here for decision is, has the legislature, by any act adopted by it, authorized the taking of the library property by appellant? The library is a public library and the land sought to be taken from it is devoted to a public use. The general rule is, that such property cannot be taken and appropriated to another and different use unless the legislative intent to so take it has been manifested in express terms or by necessary implication. *Chicago and Alton Railroad Co. v. City of Pontiac*, 169 Ill. 155; *Chicago and Northwestern Railway Co. v. City of Chicago*, 151 id. 348; 10 Am. & Eng. Ency. of Law, 1094; 15 Cyc. 616.

It is not contended by appellant that express authority is found in any legislative act to take the property here sought to be taken, but it is insisted such authority is necessarily implied from the seventh clause of section 1 of article 5 of the Cities and Villages act, which confers power upon the municipal authorities "to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same." In *Chicago and Northwestern Railway Co. v. City of Chicago*, *supra*, the right of the city to extend streets across the right of way of the railroad company was denied by the company. The court

held that the clause of the Cities and Villages act above quoted did not authorize the taking of property already devoted to a public use, but that the 89th clause of section 1 of article 5 did authorize the city to extend its streets across the railroad right of way and tracks. That clause confers power upon the city to extend, by condemnation or otherwise, any street, alley or highway over or across any railroad track, right of way or land of any railroad company within the corporate limits. Section 17 of the chapter on railroads confers power upon railroad corporations to take, by condemnation, property necessary to the building, operating or running of its road, but in *Illinois Central Railroad Co. v. Chicago, Burlington and Northern Railroad Co.* 122 Ill. 473, it was held that this general grant of power to railroad corporations to take real estate for railroad purposes was not intended to extend to property already applied to a public use. In that case the Chicago, Burlington and Northern Railroad Company sought to condemn for railroad purposes land belonging to the Illinois Central Railroad Company running longitudinally with and constituting a part of that company's right of way. The court held this was unauthorized, and said: "That the legislature of the State might, subject to the conditions imposed by the constitution, take the property for the purposes in question we have no doubt. And we think it equally clear that the legislature might, by a general law manifesting such intention, authorize one railroad company to condemn a part of the right of way of another to the extent and for the uses proposed in this case, but without such legislative authority or enabling act it is manifest the taking of it would be unauthorized."

Appellant cites numerous cases where the right of one railroad corporation to cross the right of way and tracks of another railroad corporation and to condemn the property for such crossing has been sustained. But those decisions have been based upon the express authority conferred

upon railroad corporations by clause 6 of section 19 of chapter 114 of the Revised Statutes. Power is also given cities by the Local Improvement act to take private property for the purpose of local improvements, but no authority is given, as we construe the act, to take property already devoted to a public use and apply it to a different use. The grant of power to take property by the Local Improvement act is general, and the same rule of construction is applicable to it that applies to the general grant of power to railroad corporations under the Railroad act.

Cases are cited by appellant from other jurisdictions where a general grant of power to take property has been construed to authorize an appropriation of property devoted to a public use to another use when it does not essentially interfere with the public use to which the property is already devoted. But those cases, we think, can have no application to this case, for the reason that it is proposed to take the land from the library and devote it to a use that will prohibit the library hereafter from any use of or control over it.

Appellant argues that taking ten feet of land will not destroy the library; that it will still have sufficient ground for carrying out the purposes for which it was established. The case must be controlled by legal principles and not by considering the practical effect of allowing the taking of the land in this particular case. If it is held appellant has authority to take part of the property, it would necessarily require holding that all of the property could be taken by virtue of the same authority, if that were sought to be done. Our conclusion upon this branch of the case is, that no authority exists in appellant to take the property of the library for the purpose of devoting it to a public street.

Appellant contends no one could be heard to object except owners of or parties having some interest in the land sought to be taken; that the title to the property of the Moline Public Library is in the board of directors, and that



they, alone, are authorized to object to the taking of its land. On this ground it is urged that the county court erred in overruling the appellant's motion to strike the objections from the files and that the judgment should be reversed for that reason, even though it be held that the appellant had no authority to condemn the land. Section 20 of the Local Improvement act requires that every person named in the commissioners' report as an owner of property to be taken or damaged, and every person who shall be named in the report as an occupant of any such parcel of land, shall be made defendant to the proceeding; also "all other persons having or claiming interests in any of said premises shall be described and designated as 'all whom it may concern,' and by that description shall be made defendants." The act further provides for notice to defendants and an opportunity for them to be heard. The object of the legislature clearly was to provide for notice to every owner and party interested in the land to be taken, of the proceeding and to afford them an opportunity to be heard. The legal title to the library property is in the library board but it is held by them in trust for the inhabitants of the city, the use of the library and property to be forever free to said inhabitants. The inhabitants of the city are the real parties in interest, for whose benefit the title is held in trust by the board of directors. It has been repeatedly held that any tax-payer of a city may enjoin the incurring of illegal indebtedness or the misapplication of public money. (*McCord v. Pike*, 121 Ill. 288; *Wright v. Bishop*, 88 id. 302; *Chestnutwood v. Hood*, 68 id. 132; *Jackson v. Norris*, 72 id. 364; *City of Springfield v. Edwards*, 84 id. 626.) If the appellant has no right to condemn the property of the library for the purpose for which it is here sought to be condemned, and if appellees, as tax-payers and two of the *cestuis que trustent* for whose benefit the property is held, would have the right, by injunction, to prevent the illegal appropriation of the property, it would seem illogical to

hold that they have no such interest as would entitle them to be heard in the proceeding to take the property, but would be entitled to a hearing in another and different forum upon the same question and for the same purpose. In other words, if appellees might have enjoined the taking of the land by application to a court of equity, we see no valid reason for holding that to be their only remedy when the same result might be accomplished by objections in the county court. As inhabitants and tax-payers of the city, for whose use and benefit the library was established and the title to it held in trust, they were interested and concerned in the preservation of the property for the purposes to which it was devoted. In our opinion the court did not err in entertaining the objections and overruling appellant's motion to strike them.

It is also urged that the court erred in dismissing the petition. The appellant contends that even if the ordinance was void and the proceeding unauthorized in so far as the taking of the library property was concerned, that did not justify dismissing the petition as to the whole improvement but it should have been dismissed only as to the library property. The principle sought to be applied by appellant is, that if a provision of an ordinance relating to one subject be void and as to another it be valid, unless the two are necessarily and inseparably connected the valid provision of the ordinance may be enforced and the invalid provision disregarded. We do not think that principle applicable to this case. The taking of the library property was an essential part of the contemplated improvement by widening the street for a distance of three blocks. Whether the city might, by an ordinance and proceedings thereunder, have widened the street from Fifteenth street to Eighteenth street except where the street abutted upon the library property, if the ordinance had so provided, is not the question to be decided. The ordinance was for improving the street by widening it from Fifteenth street to Eighteenth street.

This required taking a strip of land belonging to the library abutting upon the street a distance of 160 feet. If this could not be taken, then the contemplated improvement by widening the street from Fifteenth street to Eighteenth street must fail. This conclusion is not based upon the ground that it would not be a public benefit to widen the street a part of the distance and leave it its present width a part of the distance,—for that is probably not a judicial question,—but it is based upon the ground that widening the street where it abuts upon the library property is an essential and material part of the improvement and its omission necessarily destroys the proposed improvement. *City of Chicago v. Hill*, 251 Ill. 502.

The judgment of the county court is affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* John A. Bingham, County Collector,  
Appellee, *vs.* THE CHICAGO, BURLINGTON AND QUINCY  
RAILROAD COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. TAXES—*item of a county tax levy described as "to revenue" is too indefinite.* An item of a county tax levy described as "to revenue, \$5000," is too indefinite and uncertain to comply with the provision of the statute requiring the purposes for which taxes are levied by a county to be specified.

2. SAME—*effect where town clerk's certificate of levy is for "all town purposes."* Upon application for judgment and order of sale, where the record of the town meeting is introduced and shows the town tax levy to have been made for lawful purposes and designates the amount levied for each purpose, the tax should be sustained even though the certificate of the town clerk merely states that the tax was levied "for all town purposes."

3. SAME—*when tax levy for road and ditch damages is invalid.* A tax levy "to liquidate road and ditch damages" is invalid, where it is shown by the testimony of the highway commissioners that no such damages had been agreed upon, allowed or awarded under section 15 of the Roads and Bridges act.

APPEAL from the County Court of Jo Daviess county; the Hon. JOHN C. BOEVERS, Judge, presiding.

HODSON & CAMPBELL, (J. A. CONNELL, of counsel,) for appellant.

FRANK T. SHEEAN, State's Attorney, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court :

This appeal is prosecuted by appellant from a judgment of the county court of Jo Daviess county against it for certain taxes levied and extended against its property. The questions raised by this appeal in appellant's brief are, the correctness of the judgment of the county court in overruling the appellant's objection to the validity of the levy of \$5000 of the county tax, overruling its objection to the validity of the town tax for the town of Rice, and overruling its objection to a part of the road and bridge tax for the town of Hanover.

The county board levied \$60,000 for county purposes and specifically named the purposes for which the amount was levied. Among the purposes specified is "to revenue, \$5000." The objection to this tax was, that it is not a sufficient compliance with the statute requiring the purposes for which the tax was levied to be designated. We think, under the authority of *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 231 Ill. 209, and *People v. Illinois and Indiana Railroad Co.* 231 id. 377, and cases cited therein, this objection should have been sustained.

The fourth objection filed in the court below by appellant was to the town tax of five different townships, but the court's ruling upon said objections is questioned as to the town tax for only the town of Rice. Appellant, in stating the questions it desires this court to consider, mentions "the fourth objection, wherein appellant objects to the town tax of Rice on the ground that the levy for 'town purposes'

is improper," and refers to no other town tax. The certificate of the town clerk of the town of Rice recited that the sum of \$100 was required to be raised "for all town purposes." All the authorities hold that the levy for town taxes must be for the purposes for which a town tax is authorized to be levied, and if for more than one purpose the record must show the amount levied for each purpose. We are of opinion, however, that the purposes for which the levy was made need not be shown by the town clerk's certificate in order to make the tax valid. Upon application for judgment, where the record of the town meeting is introduced and shows the levy to have been made for lawful purposes and designates the amount levied for each purpose, the tax should be sustained, even if the certificate of the town clerk merely shows the tax was levied for town purposes. Here the appellee introduced the record of the town meeting, which specified that \$75 was levied for compensation of town officers and \$25 for contingent expenses, making a total of \$100, and the town clerk was authorized to certify the same to the county clerk as a town tax levy. This, we think, was sufficient and justified the county court in overruling appellant's objection to this tax.

The objection to the road and bridge tax of the town of Hanover, as stated in the abstract, is, that thirty-six cents on the \$100 was extended under a levy made under section 13 of the Road and Bridge act and twenty cents additional under section 15 of said act, "to liquidate road and ditch damages." The objection is made to the twenty cents levy under section 15. Section 15 of the Road and Bridge act authorizes a levy of twenty cents on the \$100 "when damages have been agreed upon, allowed or awarded for laying out, widening, altering or vacating roads or for ditching to drain roads," for the purpose of paying such damages. Neither the certificate of the commissioners nor the clerk's record shows that any damages had been agreed

upon, allowed or awarded for any of those purposes. It is clearly shown by the testimony of one of the commissioners who made the levy that no damages had been agreed upon, allowed or awarded under section 15. The levy under that section was therefore invalid, and the court erred in not so holding and sustaining appellant's objection to judgment for that tax. *People v. Cairo, Vincennes and Chicago Railway Co.* (ante, p. 395.)

Appellant has argued in its brief that the tax in the town of East Galena was extended at a rate in excess of that allowed by law. The third objection of appellant is "to the tax mentioned in paragraphs 1 and 2 of this defense, on the ground that the rate extended is in excess of the rate authorized when reduced under the requirements of the statute, and the same is excessive, as shown by the amount of the tax and the rates as extended by the county clerk." Paragraph 1 referred to is an objection to the levy of \$4000 for "court house and jail." Paragraph 2 is an objection to the levy of \$5000 for "revenue" and \$11,000 for "miscellaneous." The county court sustained the objections to the levy for "court house and jail" and also the levy for "miscellaneous." Its objection to the levy of \$5000 for "revenue" was overruled by the county court, but as we hold that it should also have sustained the objection to that levy, it will be unnecessary to further consider the question as to the extension of taxes for these purposes.

The only reference to any other tax in this township to which the objection is made that it was illegally extended at a rate in excess of that allowed by law, is to the road and bridge tax contained in the sixth objection. This objection was also sustained by the county court. As there are no specific objections made to any other tax in this township we will not consider the question whether any has been illegally extended.

The judgment of the county court in overruling the objections to the \$5000 county tax for "revenue" and the

road and bridge tax of the town of Hanover levied under section 15 is reversed and in all other respects it is affirmed and the cause remanded to the county court, with directions to enter judgment in accordance with the views herein expressed.

*Reversed and remanded, with directions.*

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THE PEOPLE *ex rel.* Charles S. Tyler, County Collector,  
Appellee, *vs.* GEORGE SCHEIFLEY, Appellant.

*Opinion filed December 21, 1911.*

1. TAXES—*farm may lie in more than one township or county.* A farm may consist of any number of acres in fields or government subdivisions, and may lie in one township or county or in more than one; but the mere fact that different tracts of land owned by the same person are managed together as parts of one system, for stock or grain raising, does not necessarily make them a single farm.

2. SAME—*when personal property on farm is to be listed where the farm lies.* Where the owner of live stock or other personal property connected with a farm does not reside on the farm, such property is to be listed and assessed where the farm is situated.

3. SAME—*rule where tracts in different counties are managed as one farm.* Where a single tract of land comprising a farm lies partly in one county and partly in another, the personal property is to be listed and assessed in the county where the part of the farm on which the owner resides is situated; but personal property on another of his tracts of land in the other county, lying several miles from the home farm and having separate farm buildings, must be listed and assessed where such land is located, even though it is managed with the home farm as one system.

4. SAME—*what is valid objection to jurisdiction unless waived.* On application for judgment and order of sale for taxes, an objection that no copy of the paper containing the delinquent list was filed and presented to the court at the time the judgment was prayed for is a valid objection to the jurisdiction of the court; but such an objection is waived by appearing and urging general objections going to the merits.

5. SAME—*statute must be followed in order to charge personal property tax upon land.* The Revenue law expressly provides that personal property taxes shall not be charged against real estate except in case of removals or where the tax cannot be made out of personal property, and the statute provides the method by which those facts shall be shown, and unless they are shown no judgment can be rendered against the real estate.

6. SAME—*local tax collector must note cause of failure to collect, opposite delinquent's name.* The statute requires the town or district tax collector who fails to collect a personal property tax to note on his book, at the time he returns the same, opposite the name of the person charged with the tax, the reason for his failure to collect the tax; and he must also make oath that the cause of delinquency is true, that the tax remains due and unpaid and that he has used due diligence to collect the same, and the affidavit must be signed by him and entered upon his book.

7. SAME—*what is not a compliance with statute as to charging personal property tax on land.* A general affidavit pasted in the back of the collector's book is not sufficient to satisfy the requirement of the statute relative to charging personal property tax upon land, where there is no notation in the book opposite the name of the person charged with the tax and there is no statement in the affidavit that the cause of the delinquency is true and correct.

APPEAL from the County Court of Hancock county;  
the Hon. J. ARTHUR BAIRD, Judge, presiding.

VOSE & CREEL, for appellant.

CLYDE P. JOHNSON, State's Attorney, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county collector of Hancock county presented to the county court of said county his application for judgment against eighty acres of land in that county and order of sale for the personal property tax of appellant, George Scheifley. Appellant filed objections, which were overruled and a judgment was entered, from which he appealed.

The appellant was the owner of a farm of two hundred acres on which he lived with his family on April 1, 1910,



ninety acres being in McDonough county, on which the dwelling and farm buildings were situated, and the remainder lying in Hancock county. He also owned three tracts of land four or five miles west of the farm in Hancock county, including the eighty acres in question, and containing three hundred and twenty acres in all; and also two other tracts in McDonough county about three miles east of the home farm, containing about three hundred acres. The entire eight hundred acres situated in the two counties were farmed, managed and controlled by the appellant, and the work was done by men employed by the year, month or day. The home farm was mostly pasture land and the grain raised on the other tracts was partly fed there. On the land in Hancock county there were three dwelling houses, where the hired men lived. Sometimes grain was stored on the land where it was raised and sometimes it was transferred from one place to another, and some was fed at each place. On April 1, 1910, appellant had about 800 bushels of corn on the land in Hancock county. The township assessor made no assessment of the corn and returned his book to the county treasurer, who was the supervisor of assessments. The county treasurer, without the knowledge of the appellant and without notice to him, filled up a schedule provided for returns of property by owners of the same with the name of the appellant, and put down 3700 bushels of grain of the cash value of \$1560 and the assessed value of \$520. The schedule was not signed by anyone, but the county treasurer signed the jurat that it was subscribed and sworn to before him on June 1, 1910. Taxes were extended on the assessment, and the collector returned his book to the county treasurer with this personal property tax delinquent.

It is contended by appellant that the entire eight hundred acres constituted a single farm, and that all personal property on any of the tracts should have been assessed to him at his home place, in McDonough county. A farm

may consist of any number of acres in fields or government subdivisions, and may lie in one township and county or in more than one. (*People v. Caldwell*, 142 Ill. 434.) It is, perhaps, not essential that all the tracts should adjoin each other if they are not provided with separate farm buildings but constitute practically a single farm. On the other hand, the fact that different tracts of land owned by the same person are managed together as parts of one system, for the raising of stock or grain, does not make them a single farm. Personal property is to be listed and assessed in the county, town, city, village or district where the owner resides, but when the owner of live stock or other personal property connected with a farm does not reside thereon, the same is to be listed and assessed in the town or district where the farm is situated. In this case the lands in Hancock county, four or five miles from the farm on the county line, with separate farm buildings, were not a part of the home farm. The personal property on the home farm was properly assessed in McDonough county although the farm was situated partly in Hancock county, but personal property located on the separate lands in Hancock county on April 1, 1910, was subject to assessment there.

The record, however, will not sustain the judgment against the real estate for the tax on the personal property. The appellant objected to the admission in evidence of the judgment, sale, redemption and forfeiture record and questioned the sufficiency of the evidence to authorize a judgment. One objection was, that no copy of the paper containing the delinquent list was filed and presented to the county court at the time the judgment was prayed for. This is a valid objection to the jurisdiction of the court unless waived by appearing and defending on the merits. (*People v. Owners of Lands*, 82 Ill. 408; *McChesney v. People*, 174 id. 46.) But the appellant, by entering his appearance and urging general objections, waived the right

to object to the sufficiency of notice. *People v. Dragstran*, 100 Ill. 286.

The Revenue law expressly provides that the tax on personal property shall not be charged against real property except in case of removal or where the tax cannot be made out of personal property. That must be shown before judgment can be rendered against the real estate. (*Schaeffer v. People*, 60 Ill. 179; *Mt. Carmel Light and Water Co. v. People*, 166 id. 199.) The Revenue act provides the method by which that fact shall be shown. The provision is, that if any town or district collector shall be unable to collect any tax on personal property charged in a tax book by reason of the removal or insolvency of the person to whom the tax is charged, he shall, at the time of returning his book to the county collector, note in writing opposite the name of such person charged with a tax the cause of failure to collect the same. He must also make oath that the cause of delinquency is true and correct, that the tax remains due and unpaid and that he has used due diligence to collect the same, which affidavit shall be entered upon the collector's book and be signed by the town or district collector. It was necessary to show a compliance with the law in order to charge the personal property tax against the real estate, and it was not shown. There was a general affidavit pasted in the back of the collector's book, but there was no compliance with the requirement of a notation opposite the name of the person charged with the tax, and the affidavit did not state that the cause of delinquency was true and correct. So far as appears from the record there was personal property of the appellant from which the tax might have been made.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

THE FRED W. WOLF COMPANY, Appellee, vs. THE MONARCH REFRIGERATING COMPANY, Appellant.

*Opinion filed December 21, 1911.*

1. **APPEALS AND ERRORS**—*introducing evidence waives alleged error in denying motion to direct a verdict.* By introducing evidence after a motion to direct a verdict for the defendant, made at the close of the plaintiff's evidence, is overruled, the defendant waives the motion and cannot assign the ruling of the court thereon as error.

2. **SAME**—*evidence cannot be weighed on motion to direct verdict.* In passing upon the action of the trial court in directing a verdict for the plaintiff at the close of all the evidence the Supreme Court cannot weigh the evidence, but all inferences must be drawn most favorably to the evidence in favor of the defendant and all evidence contradicting it must be disregarded.

3. **SALES**—*what acts by purchaser constitute an acceptance of the goods.* Any act done by the purchaser of goods tendered in fulfillment of a contract of sale which he would have no right to do if he were not the owner, constitutes, in itself, an acceptance of the goods.

4. **SAME**—*when use of machinery after notice of its rejection is an acceptance.* Even though machinery bought on approval is tried, found defective and unsatisfactory and notice of rejection is given, yet if the purchaser continues to use the machinery in his business, such use amounts to a waiver of the right to return the machinery and an election to accept it.

5. **SAME**—*when continued use of goods cannot be said to have been upon invitation of vendor.* The use of a refrigerating plant by the purchaser after giving notice of rejection because of an inferior engine cannot be said to have been upon the invitation of the vendor for the purpose of giving the engine a thorough trial, where such use is continued after the vendor has withdrawn any such invitation as may have been made, by a letter to the purchaser stating that it has fulfilled the contract, that the plant is working satisfactorily and that the vendor will assume no further responsibility for its operation, and demanding immediate payment.

6. **SAME**—*when evidence as to an intention not to accept plant is not admissible.* Where the purchaser of a refrigerating plant, after notice of its rejection and after the vendor has given notice that it has fulfilled its contract and insists upon payment, continues to use the plant in its business for its own profit such use is

an unequivocal act of acceptance, which cannot be qualified or explained by showing any different intention on the part of the purchaser, alone.

7. *SAME—when the necessities of a purchaser's business do not change legal effect of using plant.* Where the purchaser of a refrigerating plant fills its storehouse with large quantities of perishable goods during the period allowed by the contract for testing the plant, the fact that such goods will be lost if the use of the plant is discontinued at the end of the period does not excuse the continued use of the plant by a purchaser after notice of its rejection nor qualify the legal effect of such use as an acceptance.

8. *SAME—when purchaser is not entitled to damages by way of recoupment.* Where the contract for the sale and installation of a refrigerating plant expressly provides that an acceptance after the period allowed for the test "shall be in full discharge of the agreements hereinbefore contained," the purchaser cannot, when sued for the purchase price after acceptance, prove a breach of warranty and its damages therefrom, there being nothing in the contract to show that any of the agreements or undertakings of the vendor were not to be regarded as discharged by acceptance.

9. *SAME—the acceptance of a contract may be shown by acts.* Where a contract for the sale of a refrigerating plant provides that acceptance after the period allowed for testing the plant "shall be in full discharge of the agreements hereinbefore contained," the fact of such acceptance may be shown by acts as well as by oral or written statement, there being nothing in the contract making the consequences following acceptance depend upon the manner in which such acceptance is made to appear.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. GEORGE A. CARPENTER, Judge, presiding.

MOSES, ROSENTHAL & KENNEDY, (JOSEPH W. MOSES, and WALTER BACHRACH, of counsel,) for appellant:

The circuit court erred in directing a verdict in favor of appellee for the full amount of its claim, at the conclusion of appellant's evidence, because the evidence tended to show a breach on the part of appellee of the warranties in the

contract and damages resulting therefrom to the appellant, which damages appellant was entitled to recoup under the general issue. *Crabtree v. Kile*, 21 Ill. 184; *Strawn v. Cogswell*, 28 id. 457; *Owens v. Sturges*, 67 id. 366; *Underwood v. Wolf*, 131 id. 425; *Prairie Farmer Co. v. Taylor*, 68 id. 440.

An acceptance after the test provided for in the contract does not preclude appellant from recouping damages for breach of the warranty that the plant was to be of the best material and workmanship. Such an acceptance has reference only to the agreements as to the working order, condition and capacity of the plant. *Harvesting Machine Co. v. Fields*, 90 Minn. 161.

The clause in the contract relating to acceptance did not have the effect of rendering the use by appellant of the plant in controversy an estoppel against appellant from recouping such damages as it sustained by reason of appellee's breach of warranties. Only an express acceptance would have that effect, and then only as to the provision respecting the working order, condition and capacity of the plant. *Underwood v. Wolf*, 131 Ill. 425.

The circuit court erred in excluding evidence on behalf of appellant as to the intention of the officers with whom the negotiations for the sale of the plant were conducted by appellee, not to accept the plant in controversy. *Jarrell v. Young Co.* 105 Md. 280; *Hale v. Taylor*, 45 N. H. 405.

Assuming that by the clause in the original contract, use and operation of the refrigerating plant amounted to a discharge of appellee's agreements respecting the working order, condition and capacity of the plant, yet such clause was waived by appellee's invitation to appellant to operate the plant and give it further trials. *Thresher Co. v. Shirmmer*, 122 Iowa, 699; *Osborn & Co. v. Barker*, 103 Mich. 247; *Kenney v. Bevilheimer*, 158 Ind. 653; *Harvesting Machine Co. v. Machmuller*, 95 N. W. Rep. 850; *Parsons*

*Band Cutter Co. v. Gadeke*, 95 id. 517; *Canham v. Plano Manf. Co.* 3 N. D. 229; *Holt Manf. Co. v. Dunnigan*, 22 Wash. 134; *Engine Co. v. Kennedy*, 7 Ind. App. 502; *Wood Co. v. Calvert*, 89 Wis. 640.

Under the facts and circumstances in evidence, appearing from the proof offered by both appellant and appellee, the question as to whether or not there was an acceptance of the plant prior to the 14th day of July, 1904, was a question of fact for the jury, and it was error for the trial court to exclude such issue from the jury and to direct a verdict in favor of appellee. *Norton v. Dreyfus*, 106 N. Y. 90; *Jones v. Reynolds*, 120 id. 213; *Grabfelder v. Vosburg*, 90 App. Div. (N. Y.) 307; *Greenleaf v. Hamilton*, 94 Me. 118; *Publishing House v. Westinghouse Co.* 72 App. Div. (N. Y.) 121; *Lauer v. Richmond Institution*, 8 Utah, 305.

SCOTT, BANCROFT & STEPHENS, (FRANK H. SCOTT, and JOHN E. MACLEISH, of counsel,) for appellee:

An acceptance under a contract of sale may be in full discharge of all warranties contained in the contract, and when a purchaser accepts the performance tendered by the contractor, and the contract provides that an acceptance shall be in full discharge of all agreements contained therein, the purchaser cannot claim damages for breach of warranty. *Brown v. Foster*, 108 N. Y. 387; *Underwood v. Wolf*, 131 Ill. 425; *Estep v. Fenton*, 66 id. 467.

Any act done by a buyer of property delivered under a contract of sale, and which he would have no right to do except as owner of the same, amounts to an acceptance. The plant was operated at a time when, on the undisputed evidence, no license or invitation from appellee so to do existed, and appellant by its continued use of the machinery, and its failure to reject the plant, in writing, at the end of the test run, accepted the same. 24 Am. & Eng. Ency. of Law, 1090; *Underwood v. Wolf*, 131 Ill. 425;

*Brown v. Foster*, 108 N. Y. 387; *Iron Works v. Dodsworth*, 57 Fed. Rep. 556; *Dodsworth v. Iron Works*, 66 id. 483; *Fox v. Wilkinson*, 133 Wis. 337; *Nichols v. Guibor*, 20 Ill. 285.

Where there is a substantial performance by the contractor and an acceptance of such performance by the purchaser, a recovery may be had under the special count alleging performance and acceptance thereof, and a recovery may be had under the common counts where nothing remains to be done but to pay the purchase price for the work and labor performed. *Catholic Bishop v. Bauer*, 62 Ill. 188; *Apartment House Co. v. O'Brien*, 228 id. 360; *Foster v. McEwen*, 192 id. 339; *Fowler v. Deakman*, 84 id. 130; *Geary v. Bangs*, 138 id. 77.

The evidence showed an acceptance at law. There was no question of fact to submit to the jury. 24 Am. & Eng. Ency. of Law, 1090; *Brown v. Foster*, 108 N. Y. 387; *Dodsworth v. Iron Works*, 66 Fed. Rep. 483; *Fox v. Wilkinson*, 133 Wis. 337.

Mr. JUSTICE DUNN delivered the opinion of the court:

Appellee recovered a judgment for \$13,844.57 against appellant in an action of assumpsit. The Appellate Court affirmed the judgment and granted a certificate of importance and appeal to this court.

The trial court directed the verdict. The action was for the unpaid balance of the consideration of \$21,300 agreed to be paid for the construction and installation of a refrigerating plant upon the premises of the appellant. The defense claimed was that the steam engine, which formed an essential part of the refrigerating plant to be furnished, did not conform to the specifications of the contract, and was not of the best material and workmanship as required by such specifications, but was materially defective and was worth \$5000 less than the engine specified



in the contract, and that it would cost \$5000 to make the engine actually installed conform to the specifications. The appellee's contention was that the appellant had accepted the plant in full discharge of appellee's agreements, and could therefore neither defeat the action nor recoup its damages.

The contract consisted of a written proposal signed by appellee and accepted in writing by appellant. There was a subsequent agreement whereby certain direct expansion piping was to be furnished at an increased price instead of thirty sections of air cooler required by the original contract, but the original contract was not otherwise changed by the subsequent agreement and the rights of the parties in this suit are not affected by it. The appellee's original proposal, which was accepted by the appellant, contained the following:

"We propose to furnish and erect in your building at Chicago, Illinois, in complete working order and condition and of the best material and workmanship, one refrigerating plant of 225 tons refrigerating capacity daily, consisting of the following machinery and material, all as hereinafter specified. \* \* \* It is understood that the plant as above described is to be in complete working order and condition during the month of April, 1903, unless delayed by causes over which we have no control, such as fire, providential interferences, riots, strikes, or civil commotions of any kinds. We agree that the power required to drive the compressor while doing the above work shall not exceed 282 effective horse power at fifty revolutions per minute, providing you furnish condenser water at 60 deg. Fahrenheit, in ample quantity, and that the consumption of fuel necessary to furnish steam to do the work of the engine shall not exceed two and one-quarter pounds of coal per indicated horse power per hour, providing you carry one hundred and fifty pounds boiler pressure and furnish coal which will evaporate eight pounds of water per pound of coal burned. And we agree that this machine, when prop-

erly operated, and when provided with the proper amount of expansion surface, ammonia, etc., and when operated in connection with a power plant of ample capacity, shall be of capacity to perform a refrigerating duty equivalent to the melting of 225 tons of ice during the twenty-four hours of continuous operation. After the plant is started we will furnish an engineer to have charge of the operation of the machine for ten days, during which time we will do the work and produce the temperatures herein specified. While we are in charge you are to furnish all necessary help, together with fuel, light, water, steam, oil, waste, and all other necessary supplies for the successful operation of this plant. At the end of the above mentioned ten days you shall accept or reject the plant, it being understood, however, that if it shall meet the requirements of this proposition it shall be accepted. If rejected you shall notify us in writing thereof, and hereby permit us to enter the premises and remove the same without charge to you and upon refunding to you whatever money has been paid us. An acceptance after the above mentioned period shall be in full discharge of the agreements hereinbefore contained."

The plant was not in complete working order and condition during the month of April, 1903. It was operated for a few days in August, 1903, was then shut down and was again started in April, 1904. It was not claimed that this delay occurred through any fault of the appellee or that the rights of the parties are affected by it. The plant was started in operation April 26, 1904, in charge of an engineer of appellee, and was operated until May 26, 1904. The appellee's engineer was then withdrawn. There was evidence tending to show that the engine was not of the best material and workmanship, but was substantially defective and was worth \$5000 less than if it had been in accordance with the specifications; that it could not be made to operate satisfactorily and could not do the work required of it.

On May 18 the appellee, through Mr. Knuth, its agent, presented to the appellant the following letter addressed to the appellant and requested that it be signed:

"CHICAGO, ILL.,.....1904.

*"The Fred Wolf Co., Chicago, Illinois.*

"GENTLEMEN—The refrigerating plant, per our contract dated November 28, 1902, also the expansion pipe covered by our contract dated December 22, 1903, has been installed, except the pipe in one small room in the basement of new building. The fact that the pipe in this room has not been erected is due to no fault of yours, as the room is not yet in condition to have the pipe put in. Your engineer has been in charge of the operation of the plant for the required period and machinery and apparatus is working satisfactorily, and you may treat this as a formal acceptance under such contract. It is understood that the pipe will be installed in the room referred to as soon as we are ready to have the work done.

"Yours very truly."

The appellant's officers refused to sign the letter and handed it back to Knuth, saying they did not propose to accept the plant but must reject it and would so write his firm. Frederick Espert, the secretary and treasurer of the appellant, then told Knuth the trouble with the engine and what was wrong with it, and Knuth said it would be unfair to shut the engine down,—to go ahead and run it and give it a chance to show itself; whereupon Espert said: "Well, if that is your idea,—if that is your request,—we can let the boys run it further, try it out." The next day the appellant wrote the following letter to appellee:

*"May 19, 1904.*

"Gentlemen—Referring to your letter of the acceptance left here by your representative yesterday, which relates to the contract dated Nov. 28, 1902, we have this to say: we decline to accept the steam engine, the same is not in accordance with contract and is unsatisfactory to us."

On May 25 the appellee's manager wrote the following letter to the appellant:

"Gentlemen—We have furnished all the apparatus and performed all work required of us under the provisions of our contract of November 28, 1902, and of the supplementary contract modifying such original contract, and our man has been in charge of the operation of the apparatus for a considerably longer period

than is provided in such contract. The apparatus is working perfectly and is performing the full duty guaranteed. No difficulties whatever have been experienced with the operation of this apparatus, with the exception of certain adjustments of the governor, which adjustments were made ten days ago. Since that time absolutely no difficulty has been experienced except that which is directly and entirely attributable to lack of sufficient steam pressure. Our engineer reports that on numerous occasions the steam pressure has been allowed to fall seventy-five or eighty pounds. Our contract provides that you shall furnish steam at one hundred and fifty pounds pressure per square inch, and the engine was designed for operation at that pressure. In order to keep the engine going our engineer has on several occasions been compelled to use live steam in the receiver between the high and low pressure cylinders. On Friday last we received a letter from you stating that the engine is unsatisfactory. We wrote you immediately expressing our surprise at receiving such a letter, and asking you to tell us in just what particular you think the engine does not conform to the contract requirements. This letter was received by you either Friday afternoon or early Saturday morning, and as we requested a prompt reply we should have heard from you not later than last Monday. You certainly could not have needed time to consider the matter, since when you wrote us the engine was unsatisfactory you must have known in what particular, if at all, it fails to comply with the specifications in our contract. In passing, we might say that we furnished you just the engine you ordered. Our contract provides specifically that the engine shall be of the Bates Extra Heavy Duty Compound Condensing Corliss type. Before the contract was signed you were shown photographs, blue-prints and cuts of the engine, and all matters pertaining thereto were thoroughly discussed. We know that the engine which we have furnished you complied with the contract requirements in every particular. Knowing, as we do, that we have done each and everything required to be done by us, that we have given you a plant complying in every respect with our contract, and that the time provided in such contract for you to accept or reject the apparatus has passed, we shall assume no further responsibility for its operation. We are sending herewith statement of your account as it appears on our books. This amount is now due us and we shall expect to receive check very promptly."

This letter was handed to the appellant's secretary and treasurer in his office on the day of its date by Mr. Knuth but was not opened or read until the next day, when the following reply was sent: "Yours of the 20th is at hand. We have fully replied to this matter in our letter of the

19th to you." At the time the letter was delivered another conversation occurred with Mr. Knuth substantially the same as that on May 18, previously mentioned. In it Mr. Espert stated the defects in the engine and its working and said that they could not accept it, and to Knuth's question what was to be done about it, answered, "Take it out." Knuth said that was impossible and told him to go on and run it a while; that he was sure it would come out right; that there was always more or less trouble with a new engine, and that the older an engine got practically the better it was, on account of parts having worn smooth and traveling easy.

After May 26 the appellant continued to operate the engine and plant with its own engineer until the bringing of this suit. On May 26 the appellee's attorneys wrote to the appellant that the contracts and all the correspondence had been placed in their hands; that the appellee claimed to have complied with the agreements; that the attorneys were instructed to enforce the appellee's claim, and unless immediate settlement was made would take steps to do so. The appellant replied on May 28, referring to its letter of May 19 as explaining its position in the matter, and saying: "We decline to accept the engine; you can pursue such course as you see fit."

On June 22, while the engine was in operation, a follower-bolt on the piston-head of the high-pressure cylinder broke and the engine was necessarily stopped. Knuth was sent for and came to the plant, and after examining the engine directed that another follower-bolt should be made of tool steel and that any other broken parts should be fixed up, saying: "Go ahead and give her another trial; keep her going; I know she will come out all right." He said: "We will make it all right, Espert; we don't ask you to take this engine until it is all right," to which Espert replied: "All right, Knuth; I may be wrong; I want to be fair in this matter; we will give her another trial." Again,

on July 11 Knuth came to the plant when two bolts had broken. The president of the appellant went down to the engine room with him, showed him the bolts and asked him, "What are you going to do about it?" Knuth said: "We will fix that up all right after a while; that will get along all right; there is plenty of hold in that; there is no such danger there as you think there is going to be; you just leave the pieces; give her another trial; just keep her going; I will tell you, Espert, that engine is going to come out all right." This suit was begun on July 14.

The first error argued in the appellant's brief is that the circuit court erred in refusing to direct a verdict in favor of the appellant at the conclusion of the appellee's evidence. After this motion was denied the appellant proceeded to introduce evidence. It thereby waived its motion and cannot assign the decision of the court thereon for error. *Geary v. Bangs*, 138 Ill. 77; *Joliet, Aurora and Northern Railway Co. v. Velie*, 140 id. 59; *Harris v. Shebek*, 151 id. 287; *Langan v. Enos Fire Escape Co.* 233 id. 308.

Since the verdict was directed for the appellee, all testimony which contradicts that in favor of the appellant must be disregarded and all inferences must be drawn most favorably to it. The evidence cannot be weighed, and if the facts are reasonably capable of a construction favorable to the appellant, such construction must be adopted. It must therefore be regarded as established that the plant delivered did not meet the requirements of the specifications and that the appellant was not bound to accept it. It will be assumed for the purposes of this case, though we do not express any judgment about it, that the letters of the appellant declining to accept the engine constituted a notice, in writing, of the rejection of the plant. The questions then presented are, whether the continued use and operation of the plant, including the engine, by the appellant after its rejection, before suit was brought, constituted, in law, an acceptance of the plant, or whether there is in the record any evidence

reasonably tending to explain such use and operation on some other theory than an acceptance, and whether, if there was such legal acceptance, the appellant thereby, under its contract, waived any claim for damages on account of the appellee's breach of its contract.

It cannot well be contended that the appellant's continued use of the engine after May 26 did not constitute an acceptance of the plant unless the circumstances attending such use so qualified the act as to prevent its having the ordinary effect. The test was completed, the appellee had withdrawn its engineer, claimed to have performed its contract and was demanding payment. The plant was then tendered in satisfaction of the contract. If it conformed to the contract the appellant was bound to accept it. If it did not substantially conform to the contract the appellant had the right to accept or reject it, at its option. If it chose to retain and use the engine it thereby accepted the ownership of it. Any act done by the buyer of goods tendered in fulfillment of a contract of sale, which he would have no right to do if he were not the owner, constitutes, of itself, an acceptance of the goods. (2 Benjamin on Sales,—4th Am. ed.—sec. 1051; *Cream City Glass Co. v. Freidlander*, 84 Wis. 53; *Dodsworth v. Hercules Iron Works*, 66 Fed. Rep. 483; *Brown v. Foster*, 108 N. Y. 387; *Van Winkle v. Crowell*, 146 U. S. 42; *Chapman v. Morton*, 11 M. & W. 534.) Even though the appellant had determined to reject the plant, and though its letters to the appellee and its attorneys be regarded as sufficient notice, in writing, of such rejection, it could not retain possession of the property and use it for its own profit in its business and at the same time insist upon the rejection. The two things are utterly inconsistent. While the appellant is actually accepting and using the plant its words of rejection are unavailing. Where machinery has been bought on approval, tried, found defective and unsatisfactory and notice of rejection has been given, and where, nevertheless, the vendee has continued to

use the machinery, such use amounts to a waiver of the right to return the machinery and an election to accept it. *Fox v. Wilkinson*, 133 Wis. 337; *Palmer v. Banfield*, 86 id. 441; *Stutz v. Loyalhanna Coal Co.* 131 Pa. 267; *Aultman v. Theirer*, 34 Iowa, 272.

It is contended on the part of the appellant that there is evidence tending to show that the appellant's use of the engine after May 26 was because of the appellee's invitation to continue the operation of the plant and to give the engine a further trial, for the purpose of overcoming, if possible, the appellant's objections to the engine, and that thereby the appellee waived the acceptance clause of the contract. The evidence which is supposed to have this effect relates to the conversation of appellee's agent, Knuth, on May 26, with the Espert brothers, the president and secretary and treasurer of appellant. On this subject Frederick Espert testified as follows: "We told him that we could not accept the engine,—that it was no good,—and that sooner or later the whole thing would blow up. I told him that the bearing on the compressor end traveled hot and grew hot in its travel, and that the fly-wheel was not true, and pointed out these same defects in the cylinder, and the governor did not work right. That is about as near as I can recollect. It was substantially the same argument as I had with him on a former meeting. He said it would be unfair to shut down the engine, and he wanted to know what is to be done with it. I says, 'Take it out.' 'Well,' he said, 'that would be impossible,' and I said that sooner or later it would have to be taken out or it would blow up. That is about what was said. He said, 'You go on and run it for a while; I am sure that it will come out right; there is always more or less trouble with a new engine; the older an engine gets practically the better it is, on account of parts having worn smooth and travel easy.' That is about the substance of what he said, and I told him that we had spent about all the time that we thought was necessary trying to bring the



thing out and we didn't care to experiment any further; that we feared some day there would be a serious accident there. He said, 'Go ahead and run it;' he knew it would wear smooth and come out all right."

Michael Espert testified as follows: "I had a number of subsequent conversations with Mr. Knuth prior to the evening of the day Mr. Knuth left. During the so-called thirty-day period, whenever I would discover any defects in this engine I would call his attention to it. I would go with him to the defect, show it to him, ask his opinion on it and what he thought about it. Mr. Knuth would say, 'There is no use of us quarreling over this matter; you know I have had a great deal of experience in engineering; I know that this engine, if it will be kept running,—if you will only agree to give it further trials,—this engine will come out all right.' I said: 'Mr. Knuth, suppose that high-pressure cylinder would give way; we would murder every man in this engine room, wouldn't we?' He says: 'It is impossible; it would not give way,'—that I was wrong. In those interviews I called his attention to the hot bearings on the condenser side of the distance pieces and the way they were bolted up to the high-pressure cylinder. On May 26, the last day of the run, Mr. Knuth came towards us and said: 'I am going to pull my men off; you have your boys run this engine and give her a further trial.' I said: 'Yes, I know; but, Mr. Knuth, your own man here says that the engine here is no good and that we are going to have an accident; do you want me to go right into this thing here and slaughter my men in this engine room?' He says: 'It is all bosh, Espert; don't you know that I have a lot of experience? Don't you think that I am an engineer and that I know my business? You go ahead and run that engine; have your boys run it, and any little thing that breaks, have them fix it; I know that she will wear out all right; you will be perfectly satisfied.' I said: 'Well, Mr. Knuth,

maybe I am mistaken; I am not an engineer nor an expert; if you say so we will try it.' ”

Subsequent conversations with Knuth are testified to, occurring on June 22 and July 11, but they need not be referred to here, because if the conversation of May 26 did not tend to show that the appellant's subsequent use of the engine was at the request of the appellee, to enable it to remedy the defects in the engine, then such subsequent use was an acceptance of the plant and the later conversations would not be material. At the very time of this conversation of May 26 Knuth handed to Frederick Espert the letter dated May 25, signed by the appellee's manager, in which he said: "We know that the engine which we have furnished you complied with the contract requirements in every particular. Knowing, as we do, that we have done each and everything required to be done by us, that we have given you a plant complying in every respect with our contract, and that the time provided in such contract for you to accept or reject the apparatus has passed, we shall assume no further responsibility for its operation. We are sending herewith statement of your account as it appears on our books. The amount is now due us and we shall expect to receive check very promptly." On the same day this conversation occurred the appellee's attorneys also wrote to the appellant stating that the appellee claimed that it had complied with its agreements and had instructed the attorneys to proceed to enforce its claim, and that unless immediate settlement was made they would take steps to do so. This letter the appellant answered on May 28 by calling attention to its letter of May 19 as explaining its position, reiterating that it declined to accept the engine, and saying that the appellee might pursue such course as it saw fit.

Whatever view may be taken of the conversation of Knuth, even though it be regarded as a request that the appellant continue to use the engine without being bound by such use as an acceptance, for the purpose of enabling the

appellee to overcome the objections to it, such request could not affect the rights of the parties as they existed after the receipt of the letters from the appellee's manager and its attorneys. If any invitation had theretofore been extended it was then withdrawn. The appellee stated its position to be that it had performed its contract; the time for the appellant to accept or reject had passed; the appellee would assume no further responsibility for the operation of the plant; it demanded payment, and if immediate settlement was not made its attorneys would bring prompt action to enforce it. This declaration terminated any other arrangement. The conversation with Knuth had no tendency to show any waiver on the part of the appellee subsequent to this time. The appellant recognized this situation and stood on its rights. It declined to accept the engine and left the appellee to take such course as it chose. If the matter had rested there a different case would, perhaps, have been presented, but with nothing further said or done by either party the appellant continued to use the engine as if, instead of rejecting, it had accepted it. It was operated in connection with the plant by the appellant's employees, for its benefit and under its sole control. Such application of the engine to its own use with full knowledge of its defects, the appellee refusing any further responsibility for its operation, was, in spite of the express rejection, an election to take the benefit of the contract though executed in an inferior manner to that agreed upon and was an unequivocal acceptance. If it was so, then the subsequent conversations with Knuth three weeks or more after such acceptance are of no importance.

It is urged that the court erred in admitting testimony as to the operation and use of the plant by the appellant after the suit was brought and in rejecting testimony as to the intention of the officers of the appellant not to accept the plant. The testimony admitted did no harm, for it was undisputed that the appellant did use and operate the plant

as its own before suit was brought, and thereby accepted it. The testimony rejected was immaterial, because the undisputed use of the plant was an unequivocal act of acceptance, which could not be qualified or explained by showing any different intention on the part of the appellant, alone. *Brown v. Foster, supra.*

The appellant offered to prove that large quantities of eggs, poultry, butter and like products of a perishable nature were stored in its warehouse; that to produce the refrigeration necessary for their preservation required the operation of the machinery furnished by appellee, and that to have shut it down would have resulted in great destruction and loss of such perishable property and great damage to appellant. The necessities of the appellant's business can not relieve it from the terms of its contract. Without regard to the question on whom the loss would eventually fall, the situation was one in which the parties had voluntarily placed themselves. When the appellant filled its warehouse with perishable property it knew that upon the completion of the test it must either accept or reject the plant, and that a rejection would be followed by the shutting down of the whole plant. When the test was completed the appellant might have rejected the plant if not in conformity with the contract, but having done so, the situation which it had voluntarily brought about would not justify its using the plant which it had rejected, either for an actual profit or to save a loss.

It is also urged that the nature, size and weight of the machinery prevented the retention of it from constituting an acceptance of the plant by the appellant. There was here, besides the possession of the property arising out of the ownership of the land on which it was placed, a use of it consistent only with a claim of ownership. The use is such as was held to constitute an acceptance in *Underwood v. Wolf*, 131 Ill. 425, and *Dodsworth v. Hercules Iron Works, supra.* The contract itself provided that in case of

rejection the plant should be removed, and no reason appears why it is not capable of removal.

It is also contended that the contract required the appellee to remove the plant if it was rejected, and that its continued retention cannot be regarded as an acceptance after the appellee was notified of its rejection. Since we have held that the admitted facts constitute an acceptance and not a rejection of the plant, this proposition is without foundation.

It is insisted that the court should not have instructed the jury to find a verdict in favor of the appellee for the full amount of its claim because the evidence tended to show a breach on the part of the appellee of the warranties in the contract and damages resulting therefrom to the appellant, which it was entitled to recoup under the general issue. It is true that the acceptance of goods bought with an express or implied warranty of quality does not prevent the vendee from showing a breach of the warranty, and his damages, by way of recoupment, thus reducing the sum to be recovered in an action for the price of the goods. (*Underwood v. Wolf, supra.*) There is no reason, however, that a vendee may not, if he sees fit, upon his acceptance of the goods, waive any damages for a breach of warranty, or that he may not agree in advance that his acceptance of the goods shall be in full discharge of the contract. This is what was done here. The contract expressly provided that "an acceptance after the above mentioned period" (the ten days' test) "shall be in full discharge of the agreements hereinbefore contained."

It is contended that the acceptance here referred to means an express acceptance, and that the agreements mentioned are only those concerning the working order, condition and capacity of the plant, and do not include the warranty as to materials and workmanship. There is nothing either in the language or nature of the contract to justify this claim. All the agreements of the appellee, except

those for indemnity against patent litigation, including those in regard to material, workmanship, kind, number, quality, time, power and capacity, preceded in the written contract the provision in regard to acceptance. The language is general, and no attempt is apparent to make any distinction among the agreements which are to be regarded as discharged by acceptance. The consequences which follow acceptance are not made to depend upon the manner in which such acceptance is made to appear. The fact of acceptance is the condition upon which the discharge of the agreements is made to depend, and this fact may be shown as fully by acts as by an oral or written statement. The agreement that an acceptance should be in full discharge of agreements may have been unwise for the appellant to make, but a court has no authority to relieve from its obligation.

*Judgment affirmed.*

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JOHN MCCOY, Appellee, vs. MARY SHEEHY *et al.*  
Appellants.

*Opinion filed December 21, 1911.*

1. **WILLS**—*when testator has sufficient mental capacity to make a will.* Proof that the testator was weakened by disease and his mind, until aroused, partially dormant, does not show that he did not have sufficient mental capacity to make the will, where it is shown that at that time his mind was clear, that he talked an hour with his attorney, telling him the number of acres of land and the amount of personal property he owned, stating how he purchased the land, mentioning his children in the order of their birth as the objects of his bounty, stating how he wanted the property divided between his wife and children, and otherwise exhibiting discriminating judgment.

2. **SAME**—*mere fact that the testator was about to die when he made his will does not invalidate it.* The mere fact that the testator was sick and about to die when he made his will does not invalidate it, and if he has sufficient mental capacity to comprehend the nature and character of his property and the objects of his bounty, and understands the business in which he is engaged, he has sufficient mental capacity to make the will.

APPEAL from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

MORRIS J. HINCHCLIFF, HERRICK & HERRICK, and JOHN FULLER, for appellants.

EDWARD J. SWEENEY, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The county court of DeWitt county admitted to probate a paper purporting to be the last will and testament of Michael Sheehy, deceased. Appellants took an appeal to the circuit court of said county, and that court also admitted the will to probate, and a further appeal has been prosecuted to this court.

It appears from the evidence that Michael Sheehy had been suffering from disease for some time and was in an enfeebled condition; that on the 20th day of December, 1910, he was removed from his home in DeWitt county to St. Joseph's Hospital at Bloomington, McLean county, where he died on the first day of January, 1911; that on the morning of the 28th of December he had a sinking spell, and after he had rallied he asked his attending physician as to his condition, and the physician informed him he was in a precarious condition and likely to die soon, and if he had any business to transact he had better attend to it at once. His attorney was telephoned to and arrived on the afternoon train of that day, and after a conference with Sheehy he prepared the will admitted to probate, and the same was executed at about nine o'clock that evening while Sheehy was propped up with pillows in bed. The will gave his property, which consisted of two hundred acres of farming land and personal property, (the personal property consisting of stock, farming machinery, grain, machinery, etc., and being of the value of from \$4000 to \$5000 and located upon the farm where he and his family

resided,) to his wife and children, and provided the land should not be sold for twelve years, when his youngest child would be of age. The will was in due form and was attested by Nellie Trainor, an attendant at the hospital, and Wesley Davis, a friend of twenty years' standing, who accompanied him to the hospital, as subscribing witnesses.

When the will was presented for probate in the county court objection was made to its probate on the ground that Michael Sheehy did not have sufficient mental capacity to make a will at the time the will was executed. The subscribing witnesses were called at the hearing in the circuit court and they each testified in open court that they were present and saw the testator sign the will and that he asked them to sign it as witnesses to its execution, which they did in the presence of the testator and in the presence of each other, and that at the time of the execution of the will they believed the testator to be of sound mind and memory. It appears from the cross-examination of said witnesses that when Michael Sheehy was brought to the hospital he was brought on a cot; that he was in bed from the time of his arrival until his death; that he was at times stupid and at other times his mind seemed to wander, and that when not aroused he paid but little attention to his surroundings, but when aroused he was rational and fully understood what was going on around him; that on the evening of the execution of the will he talked for nearly an hour with his attorney, in the hearing of the subscribing witnesses and of Mr. McCoy, a friend whom he asked to serve as executor and trustee under his will; that he informed his attorney of the number of acres of land he owned; that it was subject to a mortgage; that he had purchased it at master's sale; that he did not want it sold until his youngest child was of age; that he wanted his family to continue to reside on the farm; that he had from \$4000 to \$5000 worth of personal property, and told of what it consisted, and named his children in the order in which they were born, and



stated how he wanted his property divided between his wife and children; that when the will was prepared and ready for signature it was read over, paragraph by paragraph, to him, and he said it was all right and as he wanted it, and he then asked Miss Trainor and Mr. Davis to witness it as his will, and asked the attorney to hand him a tablet lying near on a table, on which to place the will while he signed it. It also appears from the testimony of Davis that early in the conversation preparatory to drawing the will he said he owned two hundred acres of land and that one eighty belonged to his brother and sister, but later he said it all belonged to him and he wanted his estate to go to his wife and children. It also appeared that after he had talked with the attorney, and while the attorney was writing the will, he appeared to be stupid, but on again being aroused he asked that the will be read, although he had first suggested its execution be postponed until morning, and that it was then signed and witnessed.

It is stated in the briefs that Michael Sheehy was suffering from pulmonary trouble, and the evidence of the attesting witnesses shows that during his stay at the hospital he was very weak, and he died on Sunday after the will had been executed on Wednesday, but the witnesses both say that he was fully conscious when roused; that he talked freely with his attorney as to his property and stated how he wanted it disposed of, naming the objects of his bounty, and that he fully understood what he was doing at the time he executed the will. If Michael Sheehy had sufficient mental capacity to comprehend the nature and character of his property and the objects of his bounty and understood the business in which he was engaged at the time he executed the will, he had sufficient mental capacity to make the will, and the fact that he was suffering from disease and was about to die at the time he executed the will would not avoid the will. In *Freeman v. Easley*, 117 Ill. 317, it was held a person may be so diseased, mentally,

as not to be of sound mind and yet possess a disposing mind, which is the mental capacity to know and understand what disposition he wishes to make of his property and upon whom he wishes to bestow his bounty. In *Campbell v. Campbell*, 130 Ill. 466, on page 477, the rule announced in *Buswell on Insanity* was quoted with approval, as follows: "To constitute a sound and disposing mind it is not necessary that the mind should be unbroken, unimpaired, unshattered by disease, or otherwise, or that the testator should be in full possession of his reasoning faculties. So if the testator be in a dying state, he has capacity if, when his attention is aroused, his mind acts clearly and with discriminating judgment in respect of the act to be done and its relations." In *Bevelot v. Lestrade*, 153 Ill. 625, it was said, on page 631: "The seventh instruction correctly states that although a testator may be sick at the time of making the will, yet if his mind is sufficiently clear to understand what he is doing he has sufficient capacity to make his will, and that he has sufficient capacity to make a will when in a dying condition, if, when his attention is aroused, his mind acts clearly and with discriminating judgment in respect of the act to be done and its relations."

It is doubtless true that Michael Sheehy, at the time he executed his will, was weakened by disease, and his mind, until aroused, was partially dormant, but the evidence of the subscribing witnesses to his will, who were apparently honest, intelligent and fair-minded persons, shows beyond all question that when his attention was aroused his mind was clear, and that the will was the result of a discriminating judgment exercised by him with respect to the business of making his will.

We are satisfied from the testimony of the subscribing witnesses, taken as a whole, that Michael Sheehy possessed testamentary capacity at the time that he made his will, and the circuit court did not err in admitting the will to probate, and its judgment will be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Thomas F. Scott, Appellant, *vs.*  
FRANK NELSON *et al.* Appellees.

*Opinion filed December 21, 1911.*

1. SCHOOLS—*the board of school trustees has power to adjourn regular meeting.* The board of school trustees has power to adjourn a regular meeting when not restricted by statute, and unless such adjournment is an abuse of power it is not the subject of review.

2. SAME—*when "postponed" meeting is an "adjourned" meeting.* The clerk's record showing that for want of a quorum the regular meeting of the board of school trustees was "postponed" to a later date sufficiently shows that the meeting was adjourned to such date.

3. SAME—*when a petition to create new district may be acted upon at an adjourned meeting.* The provision of the School law requiring the board of school trustees, at its regular April meeting, to ascertain whether the statute concerning the formation of new school districts has been complied with by petitioners and permitting one adjournment to enable the petitioners to comply with the law, does not make it imperative that the petition be acted upon at the regular meeting if the law has been complied with; and if no quorum is present at the regular meeting the meeting may be adjourned for that reason to a fixed future date and the petition be then acted upon.

APPEAL from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

V. F. BROWNE, State's Attorney, HERRICK & HERRICK, JOHN FULLER, and INGHAM & INGHAM, for appellant.

E. B. MITCHELL, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an information in the nature of *quo warranto* filed in the circuit court of DeWitt county by the State's attorney, upon the relation of Thomas F. Scott, against Frank Nelson, Lawrence Troxel and James Conners, to test the legality of the formation of school district No. 106 in

DeWitt county, Illinois, and to require them to show by what right and authority they are holding and exercising the office of directors of said district No. 106. The information alleges that said district was not created and organized according to law, and that respondents are usurping and exercising the office of directors of said school district without authority of law. Respondents filed a plea of justification, and set up the various steps taken and proceedings had in the organization of the district and their election and qualification as directors. A demurrer to the plea was overruled and issue joined by general and special replication to the plea. A trial was had before the court without a jury, which resulted in finding the respondents not guilty and a judgment for costs was rendered against the relator. From that finding and judgment this appeal has been prosecuted.

School district No. 106 is composed of territory taken from four districts previously organized, two of which are in township 21, north, range 1, east of the third principal meridian, and the other two in township 21, north, range 2, east of the third principal meridian. Petitions for the formation of the district were filed with the clerks of the boards of trustees of the respective townships and notice was served on the boards of directors of the districts from which it was proposed to take territory, as required by the statute. At the regular meeting of the trustees of township 21, north, range 1, east of the third principal meridian, held on April 4, 1910, but one trustee and the clerk were present. The meeting was "postponed," or adjourned, until April 11, when two trustees and the clerk were present. One trustee had some time previously removed from the township and his successor had not been chosen. April 11 the trustees took up the consideration of the petition and granted its prayer. The trustees of township 21, north, range 2, east, considered the petition at their meeting on April 4 and refused to allow it. An appeal was taken by

the petitioners to the county superintendent of schools, who affirmed the action of the trustees of township 21, north, range 1, east, and disapproved the action of the trustees of township 21, north, range 2, east, and granted the prayer of the petition and ordered the district should be formed.

No claim is made that the petitions were not in due form or that notices were not properly given. The only question argued in appellant's brief is, that the trustees of township 21, north, range 1, east, had no jurisdiction to consider the petition at the meeting held on April 11. The record of the meeting of April 4, which was made by the clerk and introduced in evidence by appellant, is as follows:

*"Waynesville, Ill., April 4, 1910.*

"At the regular semi-annual meeting of the trustees of schools, township 21, north, range 1, east of the third principal meridian, county of DeWitt, State of Illinois, held in my said office, Waynesville, Ill., on the 4th day of April, A. D. 1910, the following members present: George Robb, trustee; J. F. Dix, township treasurer and *ex-officio* clerk; J. E. Bell, absent. There being no quorum present the meeting was postponed to meet on Monday, April 11, 1910, at two o'clock P. M.

*J. F. Dix, Clerk."*

This record of that meeting shows that at the regular semi-annual meeting of the trustees held in the office of the clerk on April 4, 1910, there was no quorum present and the meeting was postponed to Monday, April 11, 1910. It is true, the word "postponed" is used instead of "adjourned," but as here used it cannot be seriously contended that it has a different meaning. Appellant's position is that it is the imperative duty of a board of trustees, at the regular meeting, to act upon the petition by granting or denying its prayer, if the law has been complied with in filing it and giving notice thereof; that an adjournment of the regular meeting can only be had where it is ascertained at said meeting that the statute has not been complied with, and then one adjournment may be had for the purpose of giving opportunity to comply with the statute. There is no dispute that the law had been complied with in filing the

petitions and giving notice and that the adjournment to April 11 was on account of there not being a quorum present. The appellant insists this was fatal to the validity of the district.

Section 34 of chapter 122 fixes the first Mondays of April and October as the times of the regular meetings of the trustees and provides that two members shall constitute a quorum for the transaction of business. The township treasurer is *ex-officio* clerk of the board of trustees. Section 46 authorizes the trustees of schools, at their regular meeting in April, to divide or consolidate districts, and create new districts out of territory belonging to two or more districts where such districts are wholly within one township, and prescribes the requirements of a petition to authorize such action. Section 47 relates to changes in districts formed of parts of two or more townships, and as to such districts the concurrent action of the trustees of each of the townships in which the district or districts lie is required, upon being petitioned as provided by section 46. Section 52 requires the petition to be filed with the clerk of the board of trustees twenty days before the regular meeting in April, and a copy of the petition to be served on the president or clerk of the school directors of each district affected by the petition. Section 53 makes it the duty of the trustees, when the petition comes before them, to ascertain whether the law has been complied with by the petitioners, and if it has not, the board shall adjourn for not longer than four weeks in order that the provisions of the statute may be complied with, but there can be but one adjournment for that purpose. Section 54 provides that if it shall appear on the day of the regular meeting, or in case of adjournment at the adjourned meeting, that the statute has been complied with, the trustees shall consider the petition, hear any voters of the district affected who may appear to oppose the petition, and shall grant or refuse the prayer of the petition without unreasonable delay.

Subsequent sections relate to appeals to the county superintendent of schools.

If appellant's position is correct, then, notwithstanding the petitioners had complied with the law so as to authorize the trustees of township 21, north, range 1, east, to act on the petition, by the failure of a quorum of the board to attend at the date of the regular meeting jurisdiction to act upon the petition thereafter was lost. We do not believe this is a reasonable construction of the provisions of the statute above set out in substance. It was essential that the petition be presented at the regular meeting of the board in April, and this was done. There being no quorum present at that meeting the petition could not be acted upon but the meeting could be kept alive by adjournment to a later date. If there had been a quorum present April 4 and the board had not completed the hearing "of legal voters of the district or districts affected by the proposed change who might appear to oppose the petition," we see no valid reason why the board could not adjourn to a later date to complete the hearing before final action. It certainly is not the purpose of the statute that a petition should be acted upon on the day of the regular meeting if a reasonable opportunity to the opponents of the petition of being heard required an adjournment. Like all other similar bodies, the board of trustees had power to adjourn a regular meeting when not restricted by the statute, and unless such adjournment is an abuse of the power it is not the subject of review. (1 Ency. of Pl. & Pr. 248; *Magenau & Brunner v. City of Fremont*, (Neb.) 9 L. R. A. 786.) The adjournment under consideration, we think, was not in violation of the statute and it was clearly no abuse of power. There being no quorum present, according to parliamentary law the only business that could be transacted was to adjourn. If the adjournment had been without day it might have ended the power of the board to act upon the petition upon its own initiative, but by adjourning to a day fixed one

week later the regular meeting was kept alive for the purpose of transacting the business, including action upon the petition.

In our opinion the judgment of the circuit court was correct, and it is affirmed.

*Judgment affirmed.*

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BURTON A. HITCHCOCK, Appellee, vs. JEFFERSON J. GREENE *et al.* Appellants.

*Opinion filed December 21, 1911.*

1. APPEALS AND ERRORS—*when a freehold is not involved.* A freehold is not involved, on appeal from a decree construing a will, where the entire estate to be distributed is in the hands of the executor and is personal property, so that whether the will is sustained or held void no party to the appeal will gain or lose a freehold estate.

2. SAME—*the State must have a monetary interest in a suit to authorize direct appeal to Supreme Court.* The interest which the State must have in a cause, within the meaning of the statute giving a direct appeal to the Supreme Court where the State is interested as a party, must be a monetary interest, and the mere fact that the State is a nominal party, having no substantial interest, is not sufficient.

3. SAME—*when interest of State is not sufficient to authorize a direct appeal to Supreme Court.* The facts that a will contains a gift "for the education of poor children," and that the Attorney General was made a party defendant to a bill to construe the will, do not authorize a direct appeal to the Supreme Court from the decree construing the will.

APPEAL from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

JUDSON STARR, and WINSLOW EVANS, for appellants.

FRANK T. MILLER, LUTHER C. HINCKLE, CHARLES C. DUTCH, JACK, IRWIN, JACK & MILES, JOHN S. STEVENS, and W. H. STEAD, Attorney General, for appellee.



PER CURIAM: This was a bill in chancery filed in the circuit court of Peoria county by Burton A. Hitchcock, as executor of the last will and testament of Phoebe Rose, deceased, who died at her home in Dunlap, in said county, on the 14th day of September, 1904, for the construction of the twenty-second paragraph of the said will. The will contained twenty-three paragraphs and a clause nominating Burton A. Hitchcock executor, and was admitted to probate on the 28th day of October, 1908. Burton A. Hitchcock qualified as executor on October 30, 1908. The estate consisted of real estate of the value of \$1200, situated in the village of Dunlap, and promissory notes, secured by mortgages, of the aggregate value of \$117,000, and some personal effects of the deceased of no great value. Prior to the filing of this bill the real estate had been sold by the executor under the powers conferred on him by the second paragraph of the will and all the personal property had been reduced by him to possession. The testatrix was a widow and childless, and after bequeathing to her relatives and friends about \$20,000 of her estate, including certain keepsakes, jewelry, etc., she incorporated into her will, as paragraph 22, the following provision: "It is my will after what I have named be satisfied what left be equally divided between home missions and foreign mission and for education of poor children." The heirs of the testatrix, certain religious and charitable corporations and the Attorney General were made parties defendant to the bill. Answers and replications were filed and the court entered a decree, in which it was determined that under the twenty-second paragraph of the will one-fourth of the estate was bequeathed to the Board of Foreign Missions of the Presbyterian Church of the United States of America, one-fourth to the Board of Home Missions of the Presbyterian Church of the United States of America, and one-half was set aside for the education of poor children, and that a trustee should be appointed to receive and handle

the fund set aside for the education of poor children, and ordered the executor to pay over to said board of foreign missions and said board of home missions each one-fourth and to the trustee thereafter appointed by the court one-half of the estate remaining after payment of all expenses of administration and the costs in that court, including certain solicitor's fees fixed by the court. Jefferson J. Greene and Langford R. Greene, two of the heirs, have prosecuted this appeal.

The executor has filed a brief in this court, in which he urges this court is without jurisdiction to determine this appeal. It is clear this court does not have jurisdiction of this appeal unless a freehold is involved or the State is interested, as a party or otherwise, in the litigation. The sole question to be determined upon this record is, did the trial court properly construe the twenty-second paragraph of the will of Phœbe Rose, deceased?

The entire estate to be distributed is in the hands of the executor and is personal property, and, regardless of the construction placed upon paragraph 22 of the will,—that is, whether it is sustained in whole or in part or is held to be absolutely void,—no party to this appeal will gain or lose a freehold estate. In order to give this court jurisdiction of an appeal on the ground a freehold is involved a freehold must be directly involved, and the fact that a freehold is collaterally or incidentally involved is not sufficient; (*Burroughs v. Kots*, 226 Ill. 40;) and to give this court jurisdiction of an appeal on the ground that the State is interested, as a party or otherwise, the State must have a direct and substantial interest in the subject matter of the litigation, and if the State is only a nominal party and has no substantial interest in the litigation no appeal from the decree of the lower court will lie directly to this court. (*Hodge v. People*, 96 Ill. 423.) The interest which the State must have in a cause, within the meaning of the statute giving a direct appeal to this court, must be a sub-

stantial interest,—a monetary interest. (*McGrath v. People*, 100 Ill. 464.) It is clear the State has no monetary interest in this litigation and is only a nominal party thereto. (*Canal Comrs. v. Sanitary District*, 191 Ill. 326.) We are of the opinion this appeal should have been taken to the Appellate Court in the first instance.

The appeal will therefore be transferred to the Appellate Court for the Second District, and the clerk of this court is hereby directed to transmit the record and files to the clerk of that court.

*Appeal transferred.*

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CLINTON C. COMSTOCK *et al.* Appellees, vs. CARRIE A. REDMOND, Appellant.

*Opinion filed December 21, 1911.*

1. JURISDICTION—*court has jurisdiction of bill to construe will where existence of trust is controverted.* The jurisdiction of a court of equity to interpret wills arises out of the general jurisdiction of chancery over trusts, and if there is a controversy as to whether a will creates a trust, a court of equity has jurisdiction to decide whether a trust is created, and if so, to construe it.

2. WILLS—*when will creates a trust.* Where a will gives all of the testator's property to his sons, "subject to the charges hereinafter specified," provides a method for ascertaining the "net amount" of the estate, and gives to each of his daughters "a sum of money" equal to a certain per cent of a specified portion of the "net amount" of the estate, to be paid semi-annually to the daughters by the sons after their discharge as executors, there is an intention shown to make the sons trustees for the daughters as to the specified portions of the estate.

3. SAME—*when bequests are not within rule against perpetuities.* Bequests to the children or grandchildren of a person in being who are living at the time of such person's death are not within the rule against perpetuities, where the terms of the will require the bequests to be paid, if at all, within twenty-one years after such person's death.

4. SAME—*when it is not error for court to find that proceedings taken by executors were in accordance with the will.* In a

proceeding by executors to construe a will it is not error for the court, in construing the will on demurrer to the bill, to find that the proceedings of the complainants had been in accordance with the terms of the creation of the trust, as the defendant, if she desired to contest that matter as a question of fact, should have answered the bill and presented that issue.

5. *APPEALS AND ERRORS*—*party cannot complain of error affecting others, only.* Where the widow does not see fit to complain that the provisions of a decree construing a will do not properly protect her interests, other persons not affected by such provisions cannot complain.

6. *COSTS*—*costs in chancery are in the discretion of the court.* Costs in chancery cases are in the discretion of the court, and this discretion, unless abused, will not be interfered with by the Supreme Court.

7. *SAME*—*when allowance of fee to guardian ad litem will be sustained.* An allowance of a fee to the guardian *ad litem* for infant defendants to a bill to construe a will will be sustained, where the decree recites that evidence was heard by the court and that services of the reasonable value of the amount fixed by the decree were rendered.

APPEAL from the Circuit-Court of Iroquois county; the Hon. FRANK L. HOOPER, Judge, presiding.

C. C. & F. L. STRAWN, (CRANGLE & VENNUM, of counsel,) for appellant.

A. F. GOODYEAR, and STEPHEN C. MALO, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

Charles H. Comstock died testate on May 13, 1907. He left a widow, Adelia Comstock. His heirs were his three sons, Clinton C., William H. and George K., and his three daughters, Alice S. Clifton, Mae R. Zumwalt and the appellant, Carrie A. Redmond. All his children were beneficiaries under his will. The sons were named as executors, but George being a minor when his father died, only the elder brothers qualified and assumed the duties of that

trust. On January 24, 1910, the sons, as executors, trustees and beneficiaries, filed a bill for the construction of the will in the circuit court of Iroquois county, setting forth the proceedings had in regard to the administration of the estate and the execution of the will and the claims made by their sisters, and particularly the appellant, as to the meaning and effect of the will and the rights of the daughters under it, and asking that the court instruct them as to their rights and duties under the will, declare whether the will was invalid in whole or in part, and ascertain and declare the rights of all the parties under it. The widow answered, admitting the allegations of the bill. A guardian *ad litem* was appointed for the infant defendants and filed an answer calling for strict proof. The appellant demurred to the bill, and upon her demurrer being overruled filed an answer. This she subsequently withdrew by leave of the court and again demurred. Her demurrer was again overruled and she elected to stand by it. The bill was taken as confessed against her, a hearing was had upon evidence, oral and documentary, and a decree was rendered construing the will in accordance with the claims of the complainants and approving their action under the will. From this decree Carrie A. Redmond has appealed.

By the first three clauses of his will the testator gave to his sons all his property, "subject to the charges hereinafter specified," to be divided equally among them, nominated his sons as executors and directed them to pay the debts of the estate. He then named certain persons whom he desired to appraise his real estate in Illinois and in Iowa, and directed his executors, upon the final settlement of his estate, to establish by their final report the amount of a fund which he designated the "net amount of my estate," and which was to be ascertained by adding to the value of his real estate as appraised by the appraisers named, the amount of personal estate remaining after the payment of

debts and cost of administration. The sixth, seventh and eighth clauses of the will gave to the three daughters, respectively, each a sum of money equal to one and a half per cent of one-sixth of the "net amount" aforesaid, to be paid six months after the date of the final discharge of the executors, and a like sum every six months thereafter during their respective lives. The tenth clause is as follows:

"I give and bequeath to the lawful issue of my daughter Alice S. Clifton, who shall be living at her death, and to the child or children then living of any of such issue who may be dead, such child or children taking the share its parent would have taken if living, a sum of money equal to one-sixth of the 'net amount of my estate,' to be paid as follows: That after the death of my daughter Alice S. Clifton, and when any child of her, the said Alice S. Clifton, shall have reached the age of twenty-one years, then the share of such child shall become due and payable; and if any child or children of my said daughter Alice S. Clifton shall die leaving issue surviving my said daughter, then such issue shall take its parent's share, and the same shall be due and payable to such issue at the time that its parent would, if living, have attained the age of twenty-one years."

The eleventh and twelfth clauses are the same as the tenth, except that they, respectively, refer to the other two daughters. The thirteenth clause provided that the sums bequeathed to the daughters and to their descendants should be paid by the three sons equally, and they were to be a charge upon all of the real estate of the testator except certain specified parcels. The clause then continues: "And it is further my will and desire that in case any of my daughters shall die without leaving any descendants her surviving, or if any daughter shall die without leaving any descendant who shall survive to take the bequest made in its behalf, then and in such case it is my will and desire that the bequest to the descendants of my daughter so dy-

ing shall lapse; and in the event any such bequest shall so lapse, then the bequest to my remaining daughters shall be increased from the date of such lapsing in a ratio corresponding with the number of my children less any such deceased daughter or daughters, that is to say: In the event that one daughter shall die without descendants or without descendants who shall survive to take as above provided, then my two remaining daughters shall receive, from the time that such bequest shall lapse, her semi-annual allowance, to be computed on one-fifth of the 'net amount of my estate,' and the legacy to the descendants of my two surviving daughters shall be increased to a sum equal to one-fifth of the 'net amount of my estate.'" The fourteenth clause provided that if at any time the three sons should desire to have themselves and their real estate relieved from the burdens imposed upon them and upon said real estate for the benefit of the daughters and their descendants, then they might apply to any court of competent jurisdiction in the county of Iroquois for the appointment of a trustee to take the fund provided for by that clause of the will in such event, and upon the appointment of such trustee they should pay him, if all the daughters were living, or if any of the daughters were dead leaving descendants her surviving, a sum of money equal to one-sixth of the "net amount" of the estate for each of said daughters, but if any daughter had died without having left any descendants, the sons should pay to the trustee such proportionate share of the "net amount" of the estate as was in the will provided to be paid to the survivor of the daughter and her descendants. The last clause of the will stated that the testator had made no provision for his wife, not because he was not deeply solicitous about her comfort and welfare, but because she had had almost no experience in business matters and in the care of property and was burdened with infirmities and afflictions that rendered her almost unable to attend to such matters, and the testator

deemed it advisable to make no provision for her, knowing that his children, and especially his sons, would see to it that her every want was supplied and her declining years were made comfortable and happy.

The appellant insists that the court was without jurisdiction to entertain the bill because there was no trust involved and because the will was so clear and unambiguous that there was no occasion for construction. The jurisdiction of equity to interpret wills arises out of the general jurisdiction of chancery over trusts. There is a controversy in this case as to whether there is a trust or not, the appellant denying and the appellees affirming its existence. In such case we have held that the circuit court has jurisdiction to determine whether or not a trust was created, and if it was created, to construe it. *McCutcheon v. Pullman Trust and Savings Bank*, 251 Ill. 551; *Orr v. Yates*, 209 id. 222.

The first clause of the will gives all the testator's property to his sons, but not absolutely. The devise is subject to the charges afterwards specified in the will. Among these charges are the devises in the sixth, seventh, eighth, tenth, eleventh and twelfth clauses. In substance these clauses provide that the sons shall pay to each of the daughters interest on one-sixth of the value of the estate during her life, and upon the death of each daughter shall pay to her heirs one-sixth of the value of the estate. The language used in each of these clauses is, "I give and bequeath \* \* \* a sum of money,"—that is to say, the testator gives out of his estate. Construing the whole will together, these bequests, in connection with those in the first clause, "subject to the charges hereinafter specified," clearly indicate the testator's intention to constitute the sons trustees of one-half of the estate for the benefit of the daughters and their descendants, in accordance with the terms of the will.

It is contended that the tenth, eleventh, twelfth and thirteenth clauses of the will violate the rule against per-



petuities. A devise or bequest which becomes vested within twenty-one years after a life in being cannot violate this rule, and the bequests contained in these clauses do so vest. Clauses 10, 11 and 12 are alike, except the name of the daughter. Clause 11 refers to the appellant. The gift is to persons living at her death,—that is, to the lawful issue of Carrie A. Redmond who shall be living at her death, and to the child or children then living of any such issue who may be dead. A child or grandchild of Mrs. Redmond, in order to take anything under this will, must be living at her death. If such child or grandchild is then twenty-one the bequest is payable immediately. If such child is not then twenty-one the bequest is not payable until that age is reached. If the person to take is not a child but a grandchild whose parent has died in Mrs. Redmond's lifetime, such grandchild will take its parent's share, payable when the parent would have attained the age of twenty-one years, or if the parent would have attained that age in Mrs. Redmond's lifetime, then payable immediately. It is entirely immaterial when these bequests may be said to vest, because they are to persons living at the time of the death of Carrie A. Redmond, who is a person in being, and they must be paid, if at all, within twenty-one years after her death, because within that time every person in being at her death will have attained the age of twenty-one years.

The court found the value of the estate, the value of the Illinois land and of the Iowa land as fixed by the appraisers, and that the proceedings of the complainants had been in accordance with the right construction of the will. It is objected that this was beyond the allegations of the bill and the authority of the court. It was proper for the court to determine whether the action of the complainants had been in accordance with the terms of the creation of the trust, and if the appellant had desired to contest it as a matter of fact she should have answered the bill and presented this issue.

The appellant has no interest in the decree of the court in regard to the widow. The latter alone could complain if the decree did not properly protect her interests, and she has not seen fit to do so.

Objection is made to the allowance of a fee to Stephen C. Malo, who was appointed guardian *ad litem* for the infant defendants. The decree recites that evidence was heard by the court and that services were rendered of the reasonable value of the amount fixed by the decree, and we cannot see from the record that the court abused its discretion.

The name of one of the infant defendants was wrongly stated in the answer. The interest of the infant defendants was to sustain the complainants' construction of the will, and this was done by the decree. No harm came of the error in the name.

Complaint is made that the court abused its discretion in taxing against the appellant certain sheriff's fees and mileage and certain witness fees. The appellant made a motion for the appointment of a guardian *ad litem* for Adelia Comstock, the widow, and upon the hearing of this motion witnesses were produced and testified. The evidence is not preserved. The court denied the motion, and the fees of the witnesses and of the sheriff accruing because of that hearing were taxed against the appellant. Costs in chancery are in the discretion of the court, and this discretion will not be interfered with unless abused. We have nothing before us from which we can find any abuse of discretion in respect to the costs.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

JOHN J. STOCK, Appellee, vs. JAMES H. MITCHELL,  
Appellant.

*Opinion filed December 21, 1911.*

1. DOWER—*when dower is barred under section 15 of Dower act.* Barring of dower under section 15 of the Dower act is not limited to cases where there is difficulty between husband and wife and an alienation and one elopes with another person and commits adultery, but applies also where a husband or wife leaves the other and commits adultery, unless the offense is subsequently condoned and the parties again dwell together.

2. SAME—*what makes a prima facie case barring dower under section 15 of the Dower act.* Proof that the husband left his wife several years before she died and that they never dwelt together again; that the husband, a few days after his wife's death, was living in a lodging house with another woman to whom he was not then married, and that such woman had been introduced by him as his wife before his wife's death, makes a *prima facie* case which will bar dower under section 15 of the Dower act, where the husband, although having full opportunity, does not meet or overcome the *prima facie* case in any way.

APPEAL from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

EDWARD J. SWEENEY, HERRICK & HERRICK, and E. B. MITCHELL, for appellant.

JOHN FULLER, and L. O. WILLIAMS, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Lillian Stock died intestate at Clinton, DeWitt county, on November 13, 1908, leaving John J. Stock, the appellee, (her husband,) and James H. Mitchell, the appellant, (her brother,) and a niece, Aleta Goodrum, daughter of a deceased brother, her only heirs-at-law. She was the owner of a farm in DeWitt county, and as she left no child or descendant the appellee became entitled to an undivided one-half interest in the farm as an heir. He filed his bill in

this case in the circuit court of DeWitt county for the assignment of dower in the other half of the farm, making appellant and Aleta Goodrum defendants. The appellant answered the bill, denying the right of appellee to dower, and the issue was referred to the master in chancery, who found and reported in favor of the appellee. The chancellor heard the cause on exceptions to the report and overruled them, and entered a decree awarding dower as prayed for and appointing commissioners to assign the same. From that decree this appeal was prosecuted.

Section 15 of the Dower act provides that if a husband or wife voluntarily leaves the other and commits adultery, he or she shall be forever barred of dower unless they are afterwards reconciled and dwell together. The answer of the appellant alleged that the appellee voluntarily left his wife and committed adultery. The appellee and his wife lived together at Clinton until 1901, when the appellee left his wife and their home and thereafter traveled with a show, called Parker's Amusement Company. He never lived with his wife afterward and only returned to the funeral of her mother, in 1903, when he came in the morning and left in the evening of the same day, and an occasion in 1904 or 1905 when he was at the place one day. They exchanged some letters, but their number or contents were not shown, except that shortly before her death she said that he wrote her he would sign a deed if she sold the farm. She sent him money at different times, and in October, prior to her death, he sent her \$20, but the witness said that she sent him twice as much. The indications are that the letters were mere business letters. After her mother's death she lived alone in Clinton, having a companion at different times, and the last three years she had the same companion, and whenever the girl living with her was away she went to a hotel at night to sleep. She had a lingering illness and was confined to her house with consumption for nearly a year before her death. When she died a telegram

was sent to the appellee at Roanoke, Virginia, which he answered, saying it was impossible to come and to spare no expense for burial. He left his wife and never lived with her after 1901, and never even returned or saw her after 1904, or, at the latest, 1905.

In the fall of 1908 the appellee was connected with the Francis Ferrari Wild Animal Arena Company,—a trained wild animal show that took along with it other shows. The appellee was running a Katzenjammer Castle, and the show came to Roanoke, Virginia, about October 15, 1908, and opened on a lot on Commerce street, remaining there two weeks, as one witness thought, and about a month according to the recollection of another, after which winter quarters were opened at the Fair Grounds. A witness testified that he met appellee the first week of the show on the Commerce street lot, which would be some time the latter part of October, and that appellee introduced a woman who was with him, as his wife. After the show moved to the Fair Grounds the appellee and the same woman, who was called Mrs. Stock, took two rooms on the second floor of a restaurant and lodging house on Jefferson street, near the said grounds. The keeper of the restaurant and lodging house testified that the appellee and his wife occupied the rooms from the 22d or 23d of November, 1908, until the 5th or 6th of April, 1909. They lived together there as husband and wife, the woman doing the cooking and being known as Mrs. Stock. A police sergeant testified that the tents were put up on Commerce street in the early fall of 1908 and remained there something like a month and then removed to the Fair Grounds, and that appellee introduced the woman as his wife the latter part of February or first of March, 1909. A witness who drove a bread wagon testified that he delivered bread at the rooms occupied by appellee and the woman every day for two or three months, beginning two or three days after they left Commerce street. It was generally understood by relatives of the

woman that she had been married to the appellee in 1905 or 1906, but the appellee proved by his marriage certificate that his marriage with her took place on March 6, 1909.

The appellee offered no evidence in contradiction of the testimony for the defense, and his counsel rest their case upon the legal proposition that the statute barring dower only applies where there is a difficulty between husband and wife and an alienation and one elopes with another person and commits adultery, and upon the fact that the evidence did not show the existence of adulterous relations prior to November 13, 1908, when the wife died. The statute only requires that a husband or wife shall leave the other and commit the offense, by which dower is barred unless the offense is subsequently condoned and the parties dwell together. That the appellee left his wife and never lived with her for a number of years is not disputed and the parties never dwelt together afterward. The appellee was openly living with the other woman in the lodging house nine days after the death of his wife, and when, according to the certificate offered in evidence by him, they were not married. The evidence of one witness was that the appellee introduced the woman as his wife when the show was on Commerce street, the latter part of October. The police sergeant was looking after the matter of a license for the show and the show people were asking for delay, and if his recollection was correct that the show was on Commerce street for a month, the time of the introduction, according to the other witness, was certainly before the death of the appellee's wife. The evidence made a *prima facie* case under the statute, which the appellee, with full opportunity, did not meet or overcome in any way. We think the chancellor was not justified in ignoring this evidence and finding in favor of the appellee.

The decree is reversed and the cause is remanded to the circuit court, with directions to dismiss the bill.

*Reversed and remanded, with directions.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. THOMAS JENNINGS, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. CRIMINAL LAW—*exception to rule that evidence tending to prove other offenses is not admissible.* If evidence is admissible on general grounds it is not rendered inadmissible by the fact that it discloses other offenses than the one with which the accused is charged, and the test of admissibility is the connection of the facts proved with the offense charged.

2. SAME—*what evidence is admissible though it tends to prove other offenses.* Where one accused of murder denies that he was near the scene of the crime and claims he was at another place, it is proper for the prosecution to prove that shortly before the commission of the crime he was seen near the scene of the crime, even though he was engaged in other offenses when observed by the witnesses.

3. SAME—*weight to be given evidence of identification is for the jury.* The fact that the testimony of witnesses concerning the identification of the accused may not be positive and certain does not render it inadmissible, but its weight is a question for the jury, in connection with all the other circumstances in the case.

4. SAME—*finger-print evidence is admissible as means of identification.* Finger-print evidence, even though it may not be of independent strength, is admissible, with other evidence, as a means of identification and as tending to make out a case.

5. SAME—*expert evidence is not confined to classed and specified professions.* Expert testimony is not limited to classed and specified professions but is admissible where the witnesses offered have peculiar knowledge or experience not common to the world, which renders their opinions, founded on such knowledge and experience, an aid to the court or jury in determining the issues.

6. SAME—*persons expert in finger-print identification may testify.* Persons experienced in the matter of finger-print identification may give their opinions as to whether the finger prints found at the scene of the crime correspond with those of the accused, basing their conclusion upon a comparison of photographs of such prints with impressions made by the accused, there being no question as to the accuracy or authenticity of the photographs.

7. SAME—*weight to be given expert testimony is for the jury, notwithstanding the witness testifies positively.* The weight to be given to the testimony of experts in finger-print identification is a

question for the jury, notwithstanding some of them testify positively that the photographic reproductions of finger prints exhibited to them for comparison were reproductions of finger prints made by the same person.

8. SAME—*question of qualification of witness as an expert is for the court.* The question of the qualification of a witness as an expert is a matter resting largely in the discretion of the court, and there is no arbitrary and fixed test of such qualification.

9. SAME—*when question of sufficiency of evidence cannot be raised.* The question of the sufficiency of the evidence to sustain the verdict cannot be raised where neither the motion for new trial nor any exception to the ruling thereon is preserved in the bill of exceptions.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. MARCUS KAVANAGH, Judge, presiding.

WILLIAM G. ANDERSON, and F. L. BARNETT, for plaintiff in error:

The admission of evidence of alleged burglaries by defendant on the night of the Hiller murder was prejudicial error. *Farris v. People*, 129 Ill. 521; *People v. Molineux*, 168 N. Y. 264; *People v. Seaman*, 107 Mich. 348; *State v. Raymond*, 53 N. J. L. 260; *State v. Lapage*, 57 N. H. 245; *Shaffner v. Commonwealth*, 72 Pa. St. 60; *Commonwealth v. Jackson*, 132 Mass. 16; 1 Bishop's New Crim. Proc. sec. 1120.

Proof of burglaries of two houses during one hour is not competent to prove intent to murder Hiller during the next hour. *People v. Seaman*, 107 Mich. 348.

The general rule of evidence applicable to criminal trials is, that the State cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment or as aiding the proofs that he is guilty of the crime charged. *People v. Molineux*, 168 N. Y. 264; 1 Bishop's New Crim. Proc. sec. 1120.

To admit evidence of similar facts they must be of the same specific kind. *Rex v. Fisher*, 1 K. B. 149, C. C. A.;



*Rex v. Ellis*, 2 K. B. 746, C. C. A.; *Makin v. A. G.*, A. C. 57, P. C.

Evidence cannot be given for the prosecution to prove that the defendant is of bad character or has a propensity to commit criminal acts of the same nature as the offense charged. *Rex v. Turberfield*, 34 L. J. (M. C.) 20, C. C. R.; Best on Presumptions, 211; Phillips on Evidence, (10th ed.) 508.

In England, by a special statute safeguarding the rights of the defendant, the evidence of finger prints is admitted. At common law this kind of evidence is unknown, and no statutory enactment provides for the admissibility of such evidence in the courts of our own country.

W. H. STEAD, Attorney General, and JOHN E. W. WAYMAN, State's Attorney, (JOHN E. NORTHRUP, of counsel,) for the People:

It was competent to show that plaintiff in error was in the vicinity of the Hiller house at or about the time of the murder. 12 Cyc. 399; 21 id. 900, 901; *State v. Johnson*, 111 La. 935; *Collins v. State*, 2 Tenn. Cas. 412; *Richardson v. State*, 145 Ala. 49; *State v. Bates*, 182 Mo. 71.

Exculpatory falsehoods by the accused after his arrest, in denying his presence there, tended to show a consciousness of guilt. *Wilson v. United States*, 162 U. S. 613; *Hoch v. People*, 219 Ill. 286; 12 Cyc. 398, and cases cited.

When the evidence of another crime tends to identify the person who committed it as the same person who committed the crime charged in the indictment, it is admissible. 1 Wigmore on Evidence, sec. 217; 6 Ency. of Evidence, 677; *Farris v. People*, 129 Ill. 529; *State v. Folwell*, 14 Kan. 88; *State v. Johnson*, 11 La. 935; *People v. Rogers*, 71 Cal. 565; *O'Brien v. Commonwealth*, 24 Ky. L. 2511; *Jackson v. Commonwealth*, 115 Pa. 369; *Leeper v. State*, 29 Tex. App. 69.

The finger-print evidence was admissible upon the same principle which warrants the introduction of handwriting, foot prints, scars, or other physical marks or characteristics, to prove identity.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error, Thomas Jennings, was found guilty in the criminal court of Cook county of the murder of Clarence B. Hiller, the jury fixing the penalty at death and judgment being entered on the verdict February 1, 1911. This writ of error is sued out to review the record in that case.

The errors assigned are in reference to two questions: First, the introduction of evidence of other distinct offenses alleged to have been committed by plaintiff in error; and second, the admission of evidence as to finger prints.

At the time of the murder, September 19, 1910, Clarence B. Hiller, with his wife and four children, lived in a two-story frame house facing north on West One Hundred and Fourth street, just east of Waldon parkway, in Chicago. Immediately west of Waldon parkway, which runs north and south, and separated from the street by a wire fence, are the suburban tracks of the Chicago, Rock Island and Pacific Railway Company. East of the Hiller house was a vacant lot, and east of that was the residence of a family named Pickens. South of the Hiller house was a vacant space, beyond which were two houses facing west on Waldon parkway, the southern one being occupied by the McNabb family. The north or front door of the Hiller house leads into a hallway on the east side of the house, and from the south end or rear of this hallway a stairway leads up to the second floor. The south bed-room nearest the head of the stairs was occupied by the daughter Florence, thirteen years of age. Then came the bed-room of the daughter Clarice, fifteen years of age, and at the north

or front end of the second floor was a bed-room occupied by Mr. and Mrs. Hiller and the two younger children. At the head of the stairs, near the door leading to Florence's room, a gas light was kept burning at night. Shortly after two o'clock on Monday morning of September 19, 1910, Mrs. Hiller was awakened and noticed that this light was out. She called her husband's attention to the fact and he went in his night clothes to the head of the stairway, where he encountered an intruder, with whom he grappled, and in the struggle both fell to the foot of the stairway, where Hiller was shot twice, dying in a few moments. Just a little before the shooting the daughter Clarice had seen the form of a man at her doorway holding a lighted match by his body but not so as to show his face. As it was the practice of her father to get up and see if the children were all right in the night she was not frightened. The form disappeared from her doorway and she heard footsteps shuffling toward the room of her sister Florence, after which she heard a little sound made by Florence. She next heard her father going through the hallway. Then came the struggle and the shooting. Florence was awakened by somebody on her bed whom she supposed was her little brother, and she asked, "Is that you Gerald?" No reply being made, she asked, "Who is this?" and a man's voice,—not her father's,—answered, "It is me." She testified that she tried to scream but was unable to do so; that the man pushed up her nightgown and felt of her bare limbs and body; that he also placed his prickly cheek upon her face and moved about in various ways upon the bed. The stranger then hurried out and met the father. The Pickens family were awakened by the screams of Mrs. Hiller and her children, and the father, John C. Pickens, partially dressed and ran to the Hiller house. He reached there at about the same time as his son, Oliver Pickens, and officer Beardsley. The son had been visiting friends on the north side in Chicago and had left the train at the suburban sta-

tion, about a block away, and was walking towards home when he heard the screams from the Hiller house and ran there, meeting a police officer, Floyd Beardsley, who had also heard the screams and was searching for the cause. They were let in by the daughter Clarice, and found the body of Mr. Hiller lying near the bottom of the stairway, his nightgown saturated with blood. The shooting occurred about 2:25 A. M. The witnesses who reached the house shortly after, found three revolver cartridges undischarged and two leaden slugs. Neither of the shots fired had lodged in the body of the deceased, one entering the upper part of the left arm and passing out through the shoulder and neck, and the other entering the right breast and passing out through the lung and heart. Shortly thereafter Mrs. Pickens, going up-stairs to get a cover for the body, found particles of sand and gravel on Florence's bed near the foot.

About three-quarters of a mile east of the Hiller house is Vincennes road, running southerly, with a slight inclination to the west, and which is occupied by a street car line. This street is intersected at One Hundred and Third street by the tracks of the Panhandle railroad, which run southerly, with a slight inclination to the east. The street car line connects with the Chicago City railway system at Seventy-ninth street, and extends in a southerly direction from One Hundred and Third street through Blue Island to Harvey, about eight and a half miles south of One Hundred and Third street. On the west of Vincennes road, at One Hundred and Third street, is a crossing gate. Early in the morning on which the murder occurred, four police officers, who shortly before had gone off duty in that neighborhood, were sitting on a bench just north of the gate, waiting for a north-bound street car. The gate was up, so that the officers were not easily seen by one approaching from the south. About 2:38 A. M., Jennings approached the place from the south. The officers spoke to him, and

he continued walking for a few steps with his right hand in his trousers pocket, holding a loaded revolver. They searched him and took the weapon away. They did not know at this time of the murder. Jennings was perspiring, and the officers testified that fresh blood appeared at different places on his clothing. About three inches above his left wrist they found a slight wound, fresh and bleeding slightly. Jennings told the policemen that the blood came from a wound on his left little finger, received from falling off the street car at Seventy-ninth street the evening before, when he was on his way to Harvey. Dr. Clement, who examined Jennings about half-past three that morning at the police station, found the wound on the little finger scabbed over and not of recent origin. He also found the wound on the left arm fresh and bleeding, clean cut, with recent blood coming from it, not coagulated. The doctor testified that it looked like a bullet wound and not like an injury received from falling off a street car. Dr. Springer also examined Jennings, and his testimony, so far as it covered the same ground, was practically to the same effect. It was testified that the holes in the sleeves of the shirts, which were introduced in evidence as exhibits, were continuous with this fresh cut in the arm. The officers took Jennings to the station on the street cars, and when examined there, sand was found in his shoes. Jennings, when arrested, first told the officers that he lived at 1244 State street, Chicago, and later 577 Twelfth street; that he left for Harvey about seven or eight o'clock the evening before to visit friends, and that when he started to return from Harvey, about twelve o'clock, not finding a street car, he had walked back to that point.

In August, 1910, Jennings had been released on parole from the penitentiary at Joliet, where he had been sentenced on a charge of burglary. He had been paroled before but had been returned for a violation of the parole. Two weeks after his second parole, on August 16, 1910,

he purchased a new 38-caliber revolver, giving his name as Will Jones, of Peoria. On September 9 following he had pawned this revolver for two dollars under the name of Will Jackson, getting it back September 16. On the 18th he pawned it to Elroy Jones, a saloon-keeper, getting it back about 7:00 P. M. on the night of September 18, 1910. It was this revolver that the officers found on Jennings' person when he was arrested. It was loaded with five cartridges, which were marked, "A. P. C. 38 Smith & Wesson." The testimony showed that these cartridges were identical in appearance, size and markings with the three undischarged cartridges found in the hallway of the Hiller house near the dead body. Jennings testified that he had not fired the revolver since he owned it and knew of no one else firing it. The officers testified that in their judgment it had been fired twice within an hour before his arrest, arriving at this conclusion from the smell of fresh smoke and the burned powder in two chambers of the cylinder. Later, chemical tests and the evidence of a gunsmith corroborated this testimony that the chambers contained burned particles of powder.

Over the objection of the plaintiff in error evidence was admitted to the effect that about 2:00 A. M. September 19, 1910, just before the shooting of Hiller, someone entered the McNabb house. Mrs. McNabb was awakened and saw a man standing in the door with a lighted match over his head. The man was tall, broad-shouldered, and very dark. He came over to her and placed his hand on her shoulder twice, then put his hand under her clothes against her bare body. She kept shoving his hand away and cried out, "What is the matter?" The man did not reply but went to the dresser and stood there a minute and then went down the stairs. Jessie McNabb, a daughter, who occupied the same bed with her mother, was awakened and saw the intruder. She testified he wore a light-colored shirt and figured suspenders; that he was large, with broad shoulders.

From the shirt and suspenders which were introduced in evidence, and from the build of Jennings, she was of the opinion he was the man that was in their room. Mrs. McNabb also testified that she thought the man in the room was Jennings, from his size and build and from what she saw of him. Jennings was six feet tall and weighed about 175 pounds.

About 12:05 o'clock on the same morning, Clarence Halsted, living at 11,303 Church street, one block west of Vincennes road and about a mile and a quarter south of the Hiller house, was awakened by a man entering his bedroom window on the ground floor of his residence. The intruder, while he sat on the window sill with one leg in the room, lighted a match. When he saw Halsted, who had raised himself in bed on his elbow, he swung out of the window again. Halsted jumped up and grabbed at the man, his right hand catching in the curtain and his left hand in the pocket of the man's coat. As the man pulled away he tore the pocket of the coat off from the right side, thus breaking loose. Jennings' coat was found thus torn when he was arrested. Halsted identified Jennings as the man in question. Jennings told several witnesses that this tear was caused by his fall from the street car, and he and his half-brother testified at the trial that it had been torn by the door of a sand car falling against him on the Tuesday preceding the murder.

While Jennings told several witnesses, at the time of his arrest, that he left Chicago on the evening of September 18 to go to Harvey about seven o'clock, he testified on the trial, and one or two other witnesses also testified, that he did not leave the down-town part of the city until after ten o'clock on Sunday evening, September 18. He stated once or twice after his arrest that he went to Harvey to visit acquaintances named Robinson, and gave the officers to understand that after visiting with them he missed the street car and walked back. The State proved by the Rob-

insons that he did not call on them on the night in question, and later Jennings testified in his own behalf that he knocked at the Robinsons' door and no one responded, so he went to a place called Phoenix, a short distance from Harvey, where he visited a saloon. No other witness corroborated him as to his presence in Harvey, Phoenix, or at any other point south of the Halsted residence on the night in question. He denied being at the Halsted house, the McNabb house or the Hiller house, or having anything to do with the shooting. When arrested he denied that he had ever been arrested before, giving his name as Will Jones.

Mrs. Hiller testified that their house had but recently been painted, the back porch, which was the last part done, being completed on the Saturday preceding the shooting. Entrance to the house had been gained by the murderer through a rear window of the kitchen, from which he had first removed the window screen. Near the window was a porch, on the railing of which a person entering the window could support himself. On the railing in the fresh paint was the imprint of four fingers of someone's left hand. This railing was removed in the early morning after the murder by officers from the identification bureau of the Chicago police force and enlarged photographs were made of the prints. Jennings, when returned to the penitentiary for the violation of his parole, in March, 1910, had a print of his fingers taken and another print was taken after this arrest. These impressions were likewise enlarged for the purpose of comparison with the enlarged photographs of the prints on the railing. Four witnesses, over the objection and exception of counsel, testified that in their opinion the prints on the railing and the prints taken from Jennings' fingers by the identification bureau were made by the same person. Their testimony will be referred to later.

The plaintiff in error insists that reversible error was committed in receiving the testimony of Halsted, Mrs. McNabb and Jessie McNabb. The general rule is, that evi-



dence of a distinct substantive offense cannot be admitted in support of another offense. (*Farris v. People*, 129 Ill. 521; *Addison v. People*, 193 id. 405; *People v. Clemmison*, 250 id. 135.) But to this rule there are several well known exceptions. If evidence is admissible on other general grounds it is no objection to its admission that it discloses other offenses, even though they are the subject of indictment. (1 Roscoe on Crim. Evidence,—8th ed.—138; *People v. Hagenow*, 236 Ill. 514; *People v. Molineux*, 62 L. R. A. [N. Y.] 193.) “Whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense. A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.” (*State v. Adams*, 20 Kan. 311.) The test of admissibility is the connection of the facts proved with the offense charged. (*Billings v. State*, 52 Ark. 303; *People v. Walters*, 98 Cal. 138; *State v. Sebastian*, 81 Conn. 1; 1 Wigmore on Evidence, sec. 216.) Evidence which has “a natural tendency to establish the fact in controversy” should be admitted. (*Commonwealth v. Merriam*, 14 Pick. 518; *Lanphere v. State*, 114 Wis. 193.) One of the well known exceptions to the settled rule as to the admission of evidence as to collateral crimes is, when evidence of an extraneous crime tends to identify the accused as the perpetrator of the crime charged. (6 Ency. of Evidence, 677; *People v. Molineux*, *supra*, p. 268.) When an alibi is disputed it is admissible to prove a collateral offense to prove that at the time the accused was in the vicinity. (Wharton on Crim. Evidence,—8th ed.—sec. 47, note 1; 21 Cyc. 900, 901; *State v. Johnson*, 111 La. 935, and cases cited; *Richardson v. State*, 145 Ala. 46; *State v. Bates*, 182 Mo. 70; *Johnson v. Commonwealth*, 115 Pa. St. 369.) In view of plaintiff in error’s statements, after his arrest and before the trial, as to his whereabouts on that night, it was competent for the State to prove that shortly before the

crime was committed he was near the scene of the crime, even though when seen by some of the witnesses he was engaged in the commission of other crimes. The evidence objected to tended strongly to contradict his statements as to his whereabouts at that time.

It is further insisted in this connection by plaintiff in error that the evidence of Halsted, Mrs. McNabb and Miss McNabb was inadmissible because of the uncertain character of the identification. A great deal has been written and said in the past concerning the doubtful nature of testimony identifying persons. Men's faces, like their handwriting, may be so similar that the keenest observer may be baffled in seeking to discover differences. "The witness," says Wharton, "is asked how he knows that the prisoner at the bar is the person who fired the fatal shot, and his answer is, 'I infer it from a similarity of eyes, of hair, of height, of manner, of expression, of dress.' Human identity, therefore, is an inference drawn from a series of facts, some of them veiled, it may be, by disguise and all of them more or less varied by circumstances." (Wharton on Crim. Evidence,—8th ed.—sec. 13.) In his charge to the jury in the Tichborne case Lord Cockburn said: "Frequently a man is sworn to who has been seen only for a moment. A man stops you on the road, puts a pistol to your head and robs you of your watch or purse; a man seizes you by the throat, and while you are half strangled his confederate rifles your pockets; a burglar invades your house by night, and you have only a rapid glance to enable you to know his features. In all these cases the opportunity of observing is so brief that mistake is possible, and yet the lives and safety of people would not be secure unless we acted on the recollection of features so acquired and so retained, and it is done every day." (Wharton on Crim. Evidence,—8th ed.—sec. 803, note; Jones on Evidence,—2d ed.—sec. 361.) In *Ogden v. People*, 134 Ill. 599, the accused was charged with robbery. On the trial one Martin and

his wife and daughter, who had known the accused for ten years, testified that he came to their house at night with his face wrapped in red flannel and ordered them to deliver up their money. They testified positively to his identification, recognizing his voice. The court held the testimony competent and affirmed the judgment. It has been frequently held that a witness may testify to a person's identity from his voice or from observing his stature, complexion or other marks. (See 1 Wigmore on Evidence, sec. 660, and authorities cited in note 1; *State v. Lytle*, 117 N. C. 799.) This testimony was competent. The weight to be given it was a question for the jury, in view of all the other circumstances and evidence in the case.

It is further contended that the evidence as to the comparison of photographs of the finger marks on the railing with the enlarged finger prints of plaintiff in error was improperly admitted. No question is raised as to the accuracy of the photographic exhibits, the method of identifying the photographs, the taking of the finger prints of the plaintiff in error or the correctness of the enlargements, as shown by the exhibits introduced in evidence. It is earnestly insisted, however, that this class of testimony is not admissible under the common law rules of evidence, and as there is no statute in this State authorizing it the court should have refused to permit its introduction. No case in which this question has been raised has been cited in the briefs and we find no statutes or decisions touching the point in this country. This class of evidence is admitted in Great Britain. In 1909 the court of criminal appeals held that finger prints might be received in evidence, and refused to interfere with a conviction below though this evidence was the sole ground of identification. (*In re Castleton's case*, 3 Crim. App. 74.) While the courts of this country do not appear to have had occasion to pass on the question, standard authorities on scientific subjects discuss the use of finger prints as a system of identification, con-

cluding that experience has shown it to be reliable. (10 Ency. Britannica,—11th ed.—376; 5 Nelson's Ency. 28; see, also, Gross' Crim. Investigation,—Adams' Transl.—277; Fuld's Police Administration, 342; Osborn's Questioned Documents, 479.) These authorities state that this system of identification is of very ancient origin, having been used in Egypt when the impression of the monarch's thumb was used as his sign manual; that it has been used in the courts of India for many years and more recently in the courts of several European countries; that in recent years its use has become very general by the police departments of the large cities of this country and Europe; that the great success of the system in England, where it has been used since 1891 in thousands of cases without error, caused the sending of an investigating commission from the United States, on whose favorable report a bureau was established by the United States government in the war and other departments.

Four witnesses testified for the State as to the finger prints. William M. Evans stated that he began the study of the subject in 1904; that he had been connected with the bureau of identification of the Chicago police department in work of this character for about a year; that he had personally studied between 4000 and 5000 finger prints and had himself made about 2000; that the bureau of identification had some 25,000 different impressions classified; that he had examined the exhibits in question, and on the forefinger he found fourteen points of identity and on the second finger eleven points; that in his judgment the finger prints on the railing were made by the same person as those taken from the plaintiff in error's fingers by the identification bureau.

Edward Foster testified that he was inspector of dominion police at Ottawa, Canada, connected with the bureau of identification; that he had a good deal to do with finger prints for six years or more; that he had special work

✓ along that line in Vancouver and elsewhere in Canada; that he had studied the subject at Scotland Yard; that he began the study in St. Louis in 1904 under a Scotland Yard man and had taken about 2500 finger prints; that he had studied the exhibits in question and found fourteen points of resemblance on the forefinger; that the two sets of prints were made by the fingers of the same person.

✓ Mary E. Holland testified that she resided in Chicago; that she began investigation of finger-print impressions in 1904, studied at Scotland Yard in 1908, passed an examination on the subject, and started the first bureau of identification in this country for the United States government at Washington; that they have over 100,000 prints at Scotland Yard; that she also had studied the two sets of prints and believed them to have been made by the fingers of the same person.

✓ Michael P. Evans testified that he had been in the bureau of identification of the Chicago police department for twenty-seven years; that the bureau had been using the system of finger-print impressions since January 1, 1905, and that they also used the Bertillon system; that he had studied the question since 1905 or 1906 and had made between 6000 and 7000 finger prints; that he had charge of the making of the photographs of the prints on the railing; that in his judgment the various impressions were made by the fingers of the same person.

✓ All of these witnesses testified at more or less length as to the basis of the system and the various markings found on the human hand, stating that they were classified from the various forms of markings, including those known as "arches," "loops," "whorls" and "deltas."

When photography was first introduced it was seriously questioned whether pictures thus created could properly be introduced in evidence, but this method of proof, as well as by means of X-rays and the microscope, is now admitted without question. (Wharton on Crim. Evidence,—

8th ed.—sec. 544; 1 Wigmore on Evidence, sec. 795; Rogers on Expert Testimony,—2d ed.—sec. 140; Jones on Evidence,—2d ed.—sec. 581.) We are disposed to hold from the evidence of the four witnesses who testified and from the writings we have referred to on this subject, that there is a scientific basis for the system of finger-print identification and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it. Such evidence may or may not be of independent strength, but it is admissible, the same as other proof, as tending to make out a case. If inferences as to the identity of persons based on the voice, the appearance or age are admissible, why does not this record justify the admission of this finger-print testimony under common law rules of evidence? The general rule is, that whatever tends to prove any material fact is relevant and competent. (*People v. Gray*, 251 Ill. 431; Thayer's Prelim. Treatise on Evidence at Common Law, [1898 ed.] 266.) Testimony as to foot prints has frequently been held admissible. (Wharton on Crim. Evidence,—8th ed.—sec. 796; 1 Wigmore on Evidence, sec. 413; *State v. Fuller*, 9 Ann. Cas. (Mont.) 648, and note.) In *Carleton v. People*, 150 Ill. 181, on a trial for arson, evidence of foot prints near or leading to a barn and their correspondence with the feet of the accused was held competent. It was also proved that the accused was lame and walked with a kind of hop, and that the foot he limped on corresponded to the irregular tracks in the field. See Jones on Evidence, (2d ed.) sec. 400; 1 Wigmore on Evidence, sec. 660, and note 2; *State v. Ah Chuey*, 33 Am. Rep. (Nev.) 530, and note; *Commonwealth v. Pope*, 103 Mass. 440.

It is further insisted, as we understand the briefs and oral argument, that expert testimony on this subject was not permissible. Expert testimony is admissible when the subject matter of the inquiry is of such a character that

V only persons of skill and experience in it are capable of forming a correct judgment as to any facts connected therewith. (*Yarber v. Chicago and Alton Railway Co.* 235 Ill. 589.) It is an elementary rule that where the court or jury can make their own deductions they shall not be made by those testifying. (*Evans v. People*, 12 Mich. 27.) Expert evidence is not confined to classed and specified professions, but is applicable wherever peculiar skill and judgment applied to a particular subject are required to explain results or to trace them to their causes. (*McFadden v. Murdock*, 1 Ir. Rep. 1867, C. L. 211.) Expert evidence is admissible when the witnesses offered as experts have peculiar knowledge or experience not common to the world, which renders their opinions, founded on such knowledge or experience, an aid to the court or jury in determining the questions at issue. (*Taylor v. Monroe*, 43 Conn. 36; *Ellingwood v. Bragg*, 52 N. H. 488; Rogers on Expert Testimony,—2d ed.—sec. 6; 1 Greenleaf on Evidence,—Lewis' ed.—sec. 280, and authorities cited.) From the evidence in this record we are disposed to hold that the classification of finger-print impressions and their method of identification is a science requiring study. While some of the reasons which guide an expert to his conclusions are such as may be weighed by any intelligent person with good eyesight from such exhibits as we have here in the record, after being pointed out to him by one versed in the study of finger prints, the evidence in question does not come within the common experience of all men of common education in the ordinary walks of life, and therefore the court and jury were properly aided by witnesses of peculiar and special experience on this subject. It is objected that some of these witnesses were not qualified by such special experience. The question of the qualification of an expert rests largely in the discretion of the trial court. (*Bonato v. Peabody Coal Co.* 248 Ill. 422, and cases cited.) There can be no arbitrary or fixed test but necessarily only

a relative one, dependent somewhat on the subject and the particular witness. (3 Wigmore on Evidence, sec. 1923, and cases cited.) These witnesses were qualified to testify as experts on this subject. In view of the knowledge and experience of men in identifying by foot prints as compared with their knowledge and experience in identifying finger prints, it is manifest that opinions by experts might be entirely proper as to the latter class of testimony when they would not be with reference to foot prints. The jury, if the facts were all stated, would be able to draw conclusions as to foot prints as well as could expert witnesses. Thus, the case of *Heidelbaugh v. State*, 79 Neb. 499, and others of like nature relied on by counsel, do not conflict with the conclusions we have reached in this case that the opinion evidence of the experts on finger prints was competent.

It is further insisted that some of the witnesses testified positively that the finger prints represented by the photographs were made by a certain person whose finger-print impressions had been photographed, enlarged and introduced in evidence, when they should have only been permitted to testify that such was their opinion. "In general, though a witness must depose to such facts, only, as are within his own knowledge, yet there is no rule that requires him to speak with such expression of certainty as to exclude all doubt in his mind." (1 Greenleaf on Evidence,—Lewis' ed.—sec. 440.) Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury. (1 Wharton on Crim. Evidence,—8th ed.—sec. 459.) It has been said that a witness must not be examined in chief as to his belief or persuasion but only as to his knowledge of the fact. "As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation this position is cor-



rect, as where a man believes a fact to be true merely because he has heard it said to be so; but with respect to persuasion or belief as founded on facts within the actual knowledge of the witness the position is not true. On questions of identity of persons and of handwriting it is every day's practice for witnesses to swear that they believe the person to be the same or the handwriting to be that of a particular individual, although they will not swear positively, and the degree of credit to be attached to the evidence is a question for the jury." (1 Starkie on Evidence,—10th Am. ed.—172; Wharton on Crim. Evidence,—8th ed.—sec. 459, note 2; Underhill on Crim. Evidence,—2d ed.—sec. 55; 1 Wigmore on Evidence, secs. 656-659.) In *Ogden v. People*, *supra*, this court, in discussing the identification of a defendant by his voice, said (p. 601): "The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion, but the statement of a conclusion reached directly and primarily from an operation of the sense of hearing. A witness can learn and know facts by and through the exercise of his perceptive faculties,—his five senses,—and such facts he may state. (*City of Aurora v. Hillman*, 90 Ill. 61.) It was a question of fact for the determination of the jury whether or not the testimony in question sufficiently established the matter of identification." While it is usual for expert witnesses to testify that they believe or think, or in their best judgment, that such and such a thing is true, no rule of law prevents them from testifying positively on such subjects. It is for the jury to determine the weight to be given to their testimony.

It was further insisted on oral argument and in the briefs of the plaintiff in error that the evidence is not sufficient to support the verdict. Neither the motion for a new trial nor any exception thereto was preserved in the bill of exceptions, and therefore the sufficiency of the evi-

dence here to support the verdict cannot properly be raised. (*People v. Moritz*, 238 Ill. 494, and cases cited.) However, in view of the character of this case and the sentence pronounced we deem it not improper to say that all the incriminating proof points to the accused. There is absolutely nothing in the record tending to show that the crime was committed by anyone else. Among the many circumstances which must have convinced the court and jury that the plaintiff in error was the criminal agent, were his statements, so inconsistent with the testimony of many other witnesses, in explaining his whereabouts on the night in question; also his statements as to how the blood came to be on his clothing, how he received the wound on his arm, and the tearing of his coat pocket. Then, too, they must have considered his lack of motive in going to Harvey and almost immediately turning around and coming back; the improbability, when he had sufficient money to pay his car fare, that he should walk that distance at that time of the night when the cars were running each hour and one left within an hour after he claims he started; the condition of his clothing when arrested; the sand in his shoes and on the young girl's bed; the evidence that his revolver had recently been discharged; the testimony of three witnesses that he was seen in the neighborhood of the crime just before its commission; the fact that the bullets which had inflicted the mortal wounds were of the same size and kind as those in his revolver. No one of these circumstances, considered alone, would be conclusive of his guilt, but when all the facts and circumstances introduced in evidence are considered together, the jury were justified in believing that a verdict of guilty should follow as a logical sequence.

The clerk of this court is directed to enter an order fixing the period between nine o'clock in the forenoon and five o'clock in the afternoon on the sixteenth (16th) day of February, A. D. 1912, as the time when the original

sentence of death entered in the criminal court shall be executed. A certified copy of that order will be furnished by the clerk to the sheriff of Cook county.

*Judgment affirmed.*

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THE BOARD OF TRADE OF THE CITY OF CHICAGO *et al.* Appellants, *vs.* W. SCOTT COWEN *et al.* Appellees.

*Opinion filed December 21, 1911.*

1. GRAIN INSPECTION—*expense of grain inspection is a proper charge upon funds of the State.* The constitution imposes upon the legislature the duty of passing laws for the inspection of grain, and such an inspection is the exercise of the police power, and the expense thereof is a proper charge upon the funds of the State.

2. SAME—*fees for grain inspection belong to the State.* The fees paid for grain inspection do not belong to the chief grain inspector and deputy inspectors, for while they are paid compensation for service rendered, the service is the service of the State and the fees received belong to the State.

3. SAME—*grain inspection department is part of the State government.* The grain inspection department of the State is a part of the State government and its receipts are a part of the public money of the State.

4. SAME—*fact that grain inspection fees must be kept in special fund does not make them any the less public money.* Even though it may be that grain inspection fees can be used only for the purpose of paying the expenses of the grain inspection department and that they must be kept in a separate fund, still they belong to the State, and can only be paid out in accordance with the laws governing the expenditure of the money of the State.

5. SAME—*act of 1911, requiring public money to be paid into State treasury, applies to grain inspection fees.* The act of 1911, (Laws of 1911, p. 429,) requiring fees received by certain officers, boards and commissions to be paid into the State treasury and to be thereafter withdrawn only upon the warrant of the Auditor of Public Accounts pursuant to legislative appropriation, applies to grain inspection fees, notwithstanding the act of 1871 provides for their disbursement without any legislative appropriation. (*People v. Harper*, 91 Ill. 357, explained.)

6. CONSTITUTIONAL LAW—*act of 1911, requiring public moneys to be paid into State treasury, is valid.* The act of 1911, (Laws of 1911, p. 429,) requiring fees received by the officers, boards and commissions therein named to be paid into the State treasury and thereafter drawn out only on the State Auditor's warrant pursuant to legislative appropriation, is not invalid as applied to grain inspection fees, as the act is merely declaratory of a duty which has existed ever since the Grain Inspection law was enacted.

7. SAME—*title of act need not mention acts indirectly affected by it.* Where an act does not purport to be an amendatory act and only indirectly affects any other statute, it is not necessary that the title of such act shall mention any of the statutes which will be indirectly affected by it.

8. SAME—*fact that amount appropriated for grain inspection is insufficient does not render act of 1911 invalid.* The fact that the amount appropriated by the legislature for the expenses of the grain inspection department may not be sufficient to enable the department to render as complete service as is required, and that the efficiency of the Grain Inspection law is thereby impaired, does not render unconstitutional the act of 1911, requiring grain inspection fees to be paid into the State treasury and withdrawn only in pursuance of legislative appropriation.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding.

HENRY S. ROBBINS, (MARTIN H. FOSS, of counsel,) for appellants.

W. H. STEAD, Attorney General, and FRED H. HAND, (HIRAM T. GILBERT, of counsel,) for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The Board of Trade of the city of Chicago, and a number of other complainants, corporations, partnerships and individuals engaged in buying, selling and shipping grain, filed a bill in the superior court of Cook county against the chief inspector of grain of the State, the railroad and warehouse commissioners, the State Treasurer and Auditor, for an injunction to prevent the payment into the State treas-

ury of a fund of \$64,560.37 arising from grain inspection fees, or any other money received from that source, especially in Cook county, and to enjoin the grain inspector from ceasing to maintain an adequate grain inspection service, to inspect all grain tendered to him for inspection in the city of Chicago, and to apply said sum of \$64,560.37, and all other grain inspection fees, to the payment of the expenses of such inspection. A demurrer to the bill was sustained, the bill was dismissed for want of equity, and the complainants have appealed.

An act of the General Assembly which went into force on July 1, 1911, specifically required all fees received by the chief inspector of grain and all deputy inspectors, for or on behalf of the State, as well as all fees so received by a large number of other officers, boards and commissioners of the State, to be paid into the State treasury, and forbade the expenditure of any part of such fees for any purpose except upon the warrant of the Auditor of Public Accounts, based upon an appropriation by the General Assembly. All money arising from such fees in the possession, at the time the act took effect, of any of the officers, boards or commissioners mentioned in the act, was required to be paid into the State treasury within thirty days thereafter. (Laws of 1911, p. 429.) The bill attacks the constitutionality of this act, and the complainants also insist that under a proper construction it does not include fees from grain inspection service.

The office of chief inspector of grain was created by the General Assembly in 1871, and it was made his duty to have general supervision of the inspection of grain under any law of the State, under the advice and direction of the railroad and warehouse commissioners, who were authorized to make rules for the inspection of grain and to fix the rate of charges for such inspection and the manner of collection, so as, in the judgment of the commissioners, to meet the necessary expenses of the service of inspection,

and to fix the compensation of the chief inspectors, deputy inspectors and all other persons employed in the inspection service. All necessary expenses of the inspection service were required to be paid from the funds collected for inspection. (Hurd's Stat. 1909, par. 146, p. 1766.) The appellants insist that under this law the fees for inspection were not received "for or on behalf of the State." They say that "all such expenses shall be paid from the fees,—none is to be paid out of the State treasury." But the question is whether the fees belong in the State treasury. If they do, then the expenses of inspection are paid by the State even though they are paid from the fees. The appellants' counsel agree with the Attorney General that if the fees belong to the State, they are, in view of section 7 of chapter 130 of the Revised Statutes, in legal contemplation in the custody of the State Treasurer though they never came to his actual possession, and it follows, by virtue of section 17 of article 4 of the constitution, that they cannot be drawn from the treasury for the payment of the expenses of grain inspection, or for any other purpose, except in pursuance of an appropriation made by law and on the presentation of an Auditor's warrant.

Section 7 of article 13 of the constitution imposes upon the General Assembly the duty of passing laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce. This duty was met by the enactment of the law cited above, which was held in *People v. Harper*, 91 Ill. 357, to be a constitutional exercise of the legislative power. The inspection of grain is an exercise of the police power and the expense of it is a proper charge upon the funds of the State. It will not be contended that it would have been improper for the legislature to have fixed in the statute the salaries of the chief inspector, deputy inspectors and other employees engaged in the inspection of grain, and appropriated money for the payment of such salaries and the other expenses at-

tending the grain inspection service from the general funds of the State treasury. Neither would it have been improper to have fixed the fees for inspection and required their payment into the treasury. The only reason these things would not have been improper is, that the business of grain inspection is that of the State. The State renders the service and is entitled to receive compensation from those for whose benefit, presumably, it is rendered, as held in *People v. Harper, supra*. The chief inspector and deputy inspectors are officers of the State, and the fees paid for inspection are in no sense their property. They are paid as a compensation for service rendered, but the service is that of the State, rendered through its agents. The inspector and deputy inspectors cannot appropriate the fees, which are intended to pay not only the compensation of the inspector and deputy inspectors, but all of the expenses of the grain inspection department. That department is a part of the State government, and its receipts are as much a part of the public money as are those of the Secretary of State. Even though it be held that they must be kept as a separate fund and can be devoted to no other purpose than the payment of the expenses of grain inspection, still they belong to the State and are under its control for the payment of such expenses of the State, in accordance with the laws governing the expenditure of the money of the State. The common school funds cannot be applied to any other use than the support of schools, and yet it can hardly be said that they are not moneys of the State. Public money is none the less public money of the State because devoted to a special purpose or a special department of the State's service.

The serviceable doctrine of contemporaneous legislative construction, which is usually resorted to in cases of long continued, palpable disregard of constitutional limitation, is invoked here, and it is also pressed upon us that to hold the grain inspection fees public money of the State, which

can only be drawn from the treasury in pursuance of an appropriation made by law, we must overrule *People v. Harper, supra*, which held the Inspection law of 1871 constitutional, though it provided that the fees should be disbursed without any appropriation act. This feature of the statute was not considered in that case. The payment of the expenses of grain inspection by the railroad and warehouse commissioners out of the fund created from fees received for inspection was a matter which the legislature could not have considered of any particular importance. The intention was to make the service self-sustaining. The important matter was the creation of the fund, and not who should disburse it. It could as well be done through an appropriation act as through the railroad and warehouse commissioners. The provision in regard to disbursement by the latter was not so material as to require that all the legislation in regard to grain inspection should be held unconstitutional, but it was itself so manifestly contrary to the constitution that length of time could not make it valid.

It is urged that the act in question violates section 13 of article 4 of the constitution. Its title is, "An act in relation to the payment of the public money of the State into the State treasury." It is insisted that to apply the act to grain inspection fees is to apply it to what is not, under existing laws, "public money of the State" and is not within the title. What has been already said answers this position.

It is further insisted that in addition to providing for the payment of public money into the State treasury, the act, if applied to grain inspection fees, also amends existing grain inspection laws,—a subject not included within the title. The act does not purport to be an amendatory act. It only indirectly affects any other statute, and it is not necessary that the title of such an act shall mention any other statute which may be indirectly affected by it. In fact, however, the act requiring the payment of fees into



the State treasury is only declaratory of a duty which has existed ever since the Grain Inspection law was enacted.

Other objections to the constitutionality of the act are based on the propositions that it impairs the efficiency of the present Grain Inspection law because the same legislature which passed it made insufficient provision in its appropriations for the expenses of an adequate inspection of grain throughout the State; that it deprives the cities of Decatur, Joliet and Kankakee of all inspection because no appropriation has been made for the expenses of inspection in those cities, and that it will deprive some of the grain dealers in Chicago of the right to put their grain into elevators because a sufficient number of inspectors has not been provided and the owners will therefore be unable to have their grain inspected as required by law. For these reasons it is urged that the act violates the constitutional requirement for the passage of laws for the inspection of grain. These propositions have no legal foundation. The allegations of the bill as to this part of the case are, substantially, that the legislature which passed this act made insufficient appropriations for the expenses of the inspection department, and that the amounts appropriated are wholly inadequate to maintain such inspection department and continue such inspection service. Detailed statements are made, which are not necessary to be stated here, as to the amount of grain shipped to and from Chicago for a number of years, and its inspection as it went into and out of the elevators, the number of inspectors and their salaries, and the other expenses of the inspection department,—all for the purpose of showing the inadequacy of the appropriation made by the last General Assembly. But all together are of no importance here. A court cannot determine the amount which a legislature ought to appropriate for any purpose. An act cannot be constitutional or unconstitutional according to the amount of money appropriated by another act. We have held that, independent of

the act in question, these fees cannot be paid out except in pursuance of an appropriation and on the warrant of the Auditor. If this proposition is correct, then none of the reasons urged by the appellants for applying them to the expenses of grain inspection in some other way have any force.

We have not discussed the jurisdiction of a court of equity to take cognizance of the bill and it is not to be understood that we recognize such jurisdiction. The bill is without equity and the demurrer to it was properly sustained.

*Decree affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. REGNERUS Y. DANTUMA, Plaintiff in Error.

*Opinion filed December 21, 1911.*

1. CONSTITUTIONAL LAW—*Union Label law is not unconstitutional.* While a registered label of a union or association is not strictly a trade-mark, yet the legislature may lawfully provide for the registration of such a label and protect its use, and the act of 1891, (Hurd's Stat. 1909, p. 2249,) providing for the registration of a union label and for protection in its use, is not invalid.

2. CRIMINAL LAW—*what constitutes a fatal variance in prosecution for violation of Union Label law.* Where the information charges that the union label infringed was the registered label of a certain association but the proof shows that it was the registered label of another association there is a fatal variance; and such variance is not cured by taking leave to amend the information, if the amendment is not, in fact, made.

3. SAME—*what is not a violation of Union Label law.* The fact that a person who has no right to use a certain registered union label takes a contract calling for a commodity bearing such label and sub-lets the contract to a person having a right to use such label does not constitute a violation of the Union Label law of 1891, there being no provision in the contract against sub-letting, and no bad faith or intention on the part of the contractor, by subterfuge or otherwise, to use or display such label unlawfully.

WRIT OF ERROR to the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding.

THOMAS F. MONAHAN, (JESSE HOLDOM, of counsel,) for plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and W. EDGAR SAMPSON, (ZACH HOFHEIMER, of counsel,) for the People.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a criminal prosecution commenced in the municipal court of Chicago against Regnerus Y. Dantuma and Gean Forget, doing business as "The Galbraith Press," for violating section 5 of chapter 140 of Hurd's Statutes of 1909, by unlawfully using and displaying the union label of the Allied Printing Trades Council of Chicago on 120,000 cards which they printed, upon the order of J. L. Clark, for St. Vincent's Infant Asylum. A jury was waived and the case was tried by the court, and at the close of all the evidence Forget was discharged and a fine of \$100 was imposed upon Dantuma, and he was ordered to stand committed until the fine and costs were paid. He has sued out a writ of error from this court to review said judgment, and has assigned as error, first, that the statute under which he was prosecuted and convicted is unconstitutional; and secondly, conceding said statute to be constitutional, that the evidence was not sufficient to support the conviction.

Sections 1, 3 and 5 of the statute under consideration read as follows:

"Sec. 1. Whenever any person or any association or union of workingmen, has heretofore adopted or used, or shall hereafter adopt or use any label, trade-mark, term, design, device or form of advertisement for the purpose of designating, making known or distinguishing any goods, wares, merchandise or other product of labor as having

been made, manufactured, produced, prepared, packed or put on sale by such person or association or union of workingmen, or by a member or members of such association or union, it shall be unlawful to counterfeit or imitate such label, trade-mark, term, design, device or form of advertisement, or to use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such labels, trade-mark, term, design, device or form of advertisement.

"Sec. 3. Every such person, association or union that has heretofore adopted or used, or shall hereafter adopt or use, a label, trade-mark, term, design, device or form of advertisement, as provided in section one (1) of this act, shall file the same for record in the office of the Secretary of State, by leaving two (2) copies, counterparts or *fac similes* thereof with said secretary, and by filing therewith a sworn statement specifying the name or names of the person, association or union on whose behalf such label, trade-mark, term, design, device or form of advertisement shall be filed the class of merchandise and a particular description of the goods to which it has been or is intended to be appropriated; that the party so filing, or on whose behalf such label, trade-mark, term, design, device or form of advertisement shall be filed, has the right to the use of the same, and that no other person, firm, association, union or corporation has the right to such use either in the identical form or in any such near resemblance thereto as may be calculated to deceive, and that the *fac simile* copies or counterparts filed therewith are true and correct. There shall be paid for such filing and recording a fee of one (1) dollar. Any person who shall for himself, or on behalf of any other person, association or union, procure the filing of any label, trade-mark, term, design, device or form of advertisement in the office of the Secretary of State, under the provisions of this act, by making any false or fraudulent representations or declarations, verbally or in

writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence of any such filing to be recovered by or on behalf of the party injured thereby in any court having jurisdiction, and shall be punished by a fine not exceeding two hundred (200) dollars or by imprisonment not exceeding one year or both such fine and imprisonment. The Secretary of State shall deliver to such person, association or union so filing or causing to be filed any such label, trade-mark, term, design, device or form of advertisement so many duly attested certificates of the recording of the same as such person, association or union may apply for, for each of which certificates said secretary shall receive a fee of one (1) dollar. Any such certificate of record shall in all suits and prosecutions under this act be sufficient proof of the adoption of such label, trade-mark, term, design, device or form of advertisement. Said Secretary of State shall not record for any person, union or association any label, trade-mark, term, design, device or form of advertisement that would reasonably be mistaken for any label, trade-mark, term, design, device or form of advertisement theretofore filed by or on behalf of any other person, union or association.

"Sec. 5. Every person who shall use or display the genuine label, trade-mark or form of advertisement of any such person, association or union, in any manner not authorized by such person, union or association, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine of not less than \$100 nor more than \$200, or both. In all cases where such association or union is not incorporated, suits under this act may be commenced and prosecuted by any officer or member of such association or union on behalf of and for the use of such association or union."

The facts, in brief, are as follows: In June, 1911, Clark called up Dantuma on the 'phone at the place of busi-

ness of the Galbraith Press and said to him he wanted to have 120,000 cards printed for "field day" for the benefit of St. Vincent's Infant Asylum and that he wanted the union label thereon. Dantuma replied he could print the cards but he did not have the right to use the union label. Clark then asked him if he could not have the printing done with the union label on, and he replied he could. Dantuma thereupon caused a proof of the card to be set up in the Galbraith Press office with the exception of the union label, and arranged with one F. W. Colwell, who had the right to use the union label, to place thereon the union label and to have the plate as then completed electrotyped, and the cards were then printed and delivered to Clark or to the St. Vincent's Infant Asylum. The evidence was conflicting as to whether the printing was done at the office of the Galbraith Press or at the office of Colwell.

The information charged the defendants with wrongfully using the union label of the Allied Printing Trades Council of Chicago, and to prove the charge introduced in evidence a certificate of the Secretary of State showing a union label registered by the International Typographical Union of North America, of Indianapolis, Indiana. When the proof was in, leave was granted the State to amend the information by striking out the words "Allied Printing Trades Council of Chicago," and inserting in lieu thereof the words, "International Typographical Union of North America, of Indianapolis, Indiana," but the information was not amended.

It is urged by the plaintiff in error that the union label involved in this case, or any union label for that matter, is not a trade-mark, in this: that it does not show origin or ownership within the meaning of those terms as the same are used in the law pertaining to trade-marks, (*Kidd v. Johnson*, 100 U. S. 617; *Manufacturers' Co. v. Trainer*, 101 id. 51; *Columbia Mills Co. v. Alcorn*, 150 id. 46;) and that a registered union label not being a trade-mark, it

cannot be protected and its use by others prohibited by law. We think it may be conceded that a union label like the one here sought to be protected does not fall within the meaning of a trade-mark in the broad sense in which that term is used at common law. (*Cigar-Makers' Protective Union v. Conhaim*, 40 Minn. 243.) Still, we think the legislature may lawfully provide for the registration of a union label similar to the one herein involved and protect its use, and such is the holding of the courts of last resort in Massachusetts and Kentucky. (*Tracy v. Banker*, 170 Mass. 266; *Hetterman Bros. & Co. v. Powers*, 102 Ky. 133. See, also, *State v. Bishop*, (Mo.) 29 L. R. A. 200; *Schmalz v. Woolley*, (N. J.) 43 id. 86; *People v. Luhrs*, 195 N. Y. 473.) And this court is, we think, committed to that view in *Cohn v. People*, 149 Ill. 486.

We see no valid reason, and none has been suggested by counsel, why those engaged in skilled employment may not so designate the result of their labor by a union label as to enable them to secure to themselves the fruit of their skill. The skilled workman by his labor creates wealth, and if the employer of labor can by a registered trade-mark secure to himself the wealth which he has created by his industry, there can in law or justice be no reason why the man who labors, and who by his skill and industry has created a demand for a particular commodity that secures for him more remuneration, may not be equally protected by a registered label which notifies the public that the commodity offered for sale and upon which skilled labor has been expended was manufactured or created by skilled labor. We are therefore of the opinion the act providing for the registration and the protection from use by others of a union label is a valid, constitutional enactment.

The information alleged that the label infringed was the registered union label of the Allied Printing Trades Council of Chicago, while the evidence showed the label used in printing the cards delivered to Clark or the St. Vin-

cent's Infant Asylum by the defendants was the registered label of the International Typographical Union of North America, of Indianapolis, Indiana. There was here, therefore, a fatal variance between the information and the proof. This variance was sought to be obviated by an amendment to the information, but no amendment was made. The variance was, therefore, not cured. It is said, however, in the brief filed by the People that there was no variance, as the Allied Printing Trades Council of Chicago was a subordinate branch of the International Typographical Union of North America, of Indianapolis, Indiana, and had the right to use and control said label. This may be true, but the evidence does not show that fact, and upon the face of the record the variance is fatal to a conviction.

It also appears from the testimony of Colwell that the contract for the printing of the 120,000 cards, which is the basis of this prosecution, was sub-let to him, and that he did the printing of said cards at his office and used the union label in so doing, as he had the right to do. While his testimony was contradicted by that of A. Bartels, we do not think the uncorroborated testimony of Bartels upon that subject sufficient to sustain a conviction. He was a discharged employee of the defendants, and his testimony in many particulars was very uncertain and unsatisfactory. There was nothing in the contract between the defendants and Clark which prevented the defendants from sub-letting their contract with Clark to Colwell, and if they had sub-let such contract in good faith and without the intention, by subterfuge or otherwise, of using or displaying unlawfully the union label upon said cards, they, or either of them, would not be liable to a prosecution under the statute.

The judgment of the municipal court of Chicago will be reversed and the case remanded.

*Reversed and remanded.*



NELLIE IRENE MARSHALL vs. MARGARET J. MARSHALL,  
Defendant in Error.—(MELVIN T. MARSHALL, and  
EMMA J. FINGER, Plaintiffs in Error.)

*Opinion filed December 21, 1911.*

1. PARTITION—*purpose of statute authorizing sale of lands, including life estate therein.* The purpose of sections 32 and 34 of the Partition act in authorizing a sale of all estate in the land with the assent of the person entitled to an estate of dower and homestead or for life or years, is to have the fund arising from the sale take the place of the land itself.

2. SAME—*earning power of proceeds of sale is the basis for computing value of life interest.* After a sale of land under sections 32 and 34 of the Partition act, with the assent of the person having a life estate in the land, such person is entitled to the full earning power of the proceeds of the sale; and the earning power of the proceeds, and not the rental value of the land, is the proper basis for computing the present value of such estate.

3. SAME—*statute does not point out method of computing present worth of homestead and dower.* The Partition act does not point out the method of computing the present worth of homestead and dower, and in the absence of statutory regulation on the subject recourse must be had to the standard and recognized mortality tables, with such supplementary proof as is competent.

4. SAME—*standard mortality tables are admissible to aid in determining value of life estate.* To aid in determining the value of a life estate the standard mortality tables, and the computations of experts based upon such tables, are admissible in evidence, in connection with testimony as to the age and health of the life tenant and the value of the land.

5. SAME—*rule for determining value of life estate where Carlisle table is used to determine expectancy.* Where the expectancy of life of a life tenant is determined by the court from the Carlisle table, the court, in the absence of expert testimony showing how a life annuity should be computed from the Carlisle table, should follow the standard annuity table compiled from the Carlisle table, and not treat the annual earning power of the proceeds of the sale as an annuity certain for the period of expectancy.

6. SAME—*value of life estate should not be calculated at compound interest.* It is error for the court, after ascertaining the expectancy, to calculate the value of the life estate at compound

interest, as this calculation proceeds upon the theory that interest is paid the moment it is due and is instantly loaned out, which is not commonly true, and the method is therefore unfair to the remainder-men.

Writ of ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Woodford county; the Hon. GEORGE W. PATTON, Judge, presiding.

ELLWOOD & MEEK, for plaintiffs in error.

E. J. RILEY, and BARNES & MAGOON, for defendant in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

Solomon R. Marshall died intestate in 1891, seized of real estate in Woodford county. He left surviving him his widow, Margaret J. Marshall, defendant in error, and two sets of children,—three by defendant in error, and Melvin T. Marshall, Flora A. Schirer, Emma J. Finger and Florence Chapple by a former wife. Shortly after his death the children by his first wife instituted proceedings to partition the real estate and assign homestead and dower to Margaret J. Marshall. In that proceeding one and three-quarters acres of the real estate was assigned to defendant in error for her homestead and forty-eight and one-quarter acres assigned for her dower. These lands so assigned were contiguous and formed one tract of fifty acres. On October 30, 1908, Nellie Irene Marshall, one of the children of Solomon R. Marshall, filed her bill to partition the fifty acres so assigned to her mother as homestead and dower, subject to said estates. To this bill defendant in error and all the other children of Solomon R. Marshall were made defendants. Commissioners were duly appointed to partition the land, reported it indivisible, and appraised it at \$200 per acre. Margaret J. Marshall thereupon filed her as-

sent in writing to the sale of the premises free of her life estate. One of the children, Solomon R. Marshall, being a minor, the court found that it would be to his interest to sell the premises free of his homestead estate. The premises were sold for \$10,750. The cause was referred to the master to ascertain the value of the life estate of Margaret J. Marshall and of the homestead estate of the minor. The master reported, finding that Mrs. Marshall was fifty-seven years of age, and that the present value of the life estate was \$2442.65, based on the rental value of the land. Mrs. Marshall filed exceptions to the master's report, which were sustained, and a decree was entered finding that Margaret J. Marshall was fifty-seven years of age, and had an expectancy of life, based on the Carlisle mortality table, of sixteen years; that the value of her life estate in the land sold, based upon said life table, is \$5829.31; that she was entitled to receive such sum in satisfaction and extinguishment of her life estate in the premises, and decreeing payment to her accordingly. The decree also fixed the homestead estate of the minor at \$10, and after directing those payments to be made, ordered distribution of the residue according to the interests of the parties. From this decree Melvin T. Marshall and Emma J. Finger perfected an appeal to the Appellate Court for the Second District, where the decree was affirmed. The judgment of the Appellate Court is brought here for review by writ of *certiorari*.

Upon the hearing before the master it was shown that at the time these proceedings were had the land was rented for five dollars per acre, and that \$250 per year was the rental value of the land. It is first insisted on the part of plaintiffs in error that the value of the life estate of defendant in error should be determined upon the basis of the rental value of the land and not upon the interest-earning power of the proceeds of the sale. Section 32 of the Partition act provides that in case of sale of lands the court may, with the assent of the person entitled to an estate in

dower, or by the curtesy, or for life or for years, or of homestead, in the whole or any part of the premises, who is a party to the suit, sell such estate with the rest. Section 34 provides that when any such interest is sold, the value thereof may be ascertained and paid over in gross, or the proper proportion of the funds invested and the income paid over to the parties entitled thereto during the continuance of the estate. The evident purpose of these two sections is to have the fund arising from the sale take the place of the real estate when a sale has been assented to by the party entitled to an estate for life or for years. Any other construction would be strained and unreasonable. After a sale under the provisions of this statute a person having a life estate in the realty would have the same interest in the proceeds of the sale that he had in the land and would be entitled to the full earning power of the fund during his lifetime. The fund, for every purpose, takes the place of the real estate, and each party has the same interest in the fund that he had in the realty. By using the earning power of the proceeds of the sale instead of the rental value of the land as the basis for computing the interest of defendant in error the court pursued the proper method.

It is next contended that if this was the proper method, the method of computation was not correct. The Partition act does not point out any method by which the present worth of a dower or homestead estate shall be computed. It simply states that when such interest is sold the value of the same may be ascertained and paid over in gross. Any method of ascertaining the present worth of a dower or homestead interest must necessarily be an arbitrary one, as it is impossible to determine when any given individual will die. In the absence of statutory regulation of this subject, recourse must necessarily be had to the standard and recognized mortality tables, together with such supplementary proof as is competent.

On the hearing before the master complainant offered in evidence the Wigglesworth and Carlisle tables of mortality, also the Combined or Seventeen Offices Experience Table, the American Experience Table, the Thirty Offices Experience Table, the Farr No. 3 Table and the Northampton Table. The decree states that the Carlisle table was followed in computing the present value of Mrs. Marshall's life estate. No objection was made to the introduction of any of these tables, and it is not contended here by plaintiffs in error that the court erred in following the Carlisle table. No expert proof was offered showing how computations should be made, based upon mortality tables, to determine the present value of an annuity for life. The only proof, in addition to the introduction of the tables themselves, which had any bearing upon the amount Mrs. Marshall should receive in cash, was that she was fifty-seven years of age and in good health, and that the prevailing rate of interest on real estate loans in Woodford county at that time was five per cent. We have repeatedly held that to aid in determining the value of a life estate the standard mortality tables, and the computations of experts based upon such tables, are admissible in evidence, in connection with testimony as to the age and health of the life tenant and the value of the land. *City of Joliet v. Blower*, 155 Ill. 414; *Henderson v. Harness*, 184 id. 520; *Knight v. Collings*, 227 id. 348; *Winn v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 239 id. 132.

The Supreme Court of the United States has said that there is high authority for the proposition that courts can take judicial notice of the Carlisle table and can use it for estimating the probable length of life, whether the table was introduced in evidence or not. (*City of Lincoln v. Powers*, 151 U. S. 436.) The contention of the plaintiffs in error is, not that the court erred in following the Carlisle table, but that the computation based upon that table, by which it was found that the present value of the life

estate is \$5829.31, was improper. The court found from the Carlisle table that Mrs. Marshall had an expectancy of sixteen years, and it is apparent that in arriving at the amount allowed the widow and minor in gross, the method pursued was to take \$537.50, which is five per cent of \$10,750, and treat that sum as an annuity certain for sixteen years; then by the application of arithmetical rules in the computation the result named was determined. Annuity tables have been computed from each of the standard mortality tables, whereby the present value of an annuity of one dollar on a single life at every age is shown according to the table of mortality upon which the computation is made. In some annuity tables the amount thus arrived at is referred to as the number of years' purchase the annuity is worth. These computations have been made by skilled and competent persons, and the tables thus compiled are regarded as a part of the mortality tables from which they have, respectively, been deduced. In compiling these tables the expectancy of life is not used as the basis, but the results are arrived at by finding the average chance of death or life in any year up to the extremity of human life, and from that result the present value of an annuity of one dollar at a given age and rate per cent is computed. By this method of computation the law of averages is followed throughout. From the standard annuity table according to the Carlisle table of mortality the present value of an annuity of one dollar on the life of a person of the age of fifty-seven years, at five per cent, is \$9.771, which is a result considerably different from that arrived at by the chancellor. In the absence of any testimony by persons skilled in such matters showing how a life annuity should be computed from the Carlisle table of mortality at the age of fifty-seven years, the court should have followed the standard annuity table compiled according to the Carlisle table of mortality. By following that table, the value of a life estate for a person fifty-seven years of age, at five

per cent, is found to be \$5251.91. In any event, the method of computation pursued by the chancellor was erroneous. After having ascertained the expectancy, the value of the life estate was calculated at compound interest. This calculation proceeded upon the theory that the interest is paid the moment it is due and is instantly loaned out. Common experience teaches us that this rarely ever occurs, and if this method of computation is a correct one, a proper allowance should be made for the inability always to make an immediate re-investment. It is true that the amount allowed the remainder-men, after deducting the value of the life estate as found by the chancellor, is a sum sufficient, when put out at compound interest for sixteen years, at five per cent, with its earnings, to make the total of \$10,750, the proceeds of the sale. But as above pointed out, assuming that the expectancy was correctly placed at sixteen years, the method of computation is not fair to the remainder-men.

No objection is made by plaintiffs in error to the use of the rate of five per cent in making the computation, except that they contend that if the earning power of the fund is to be used as a basis, such a rate per cent should be used as would produce a revenue of \$250 per year, or an amount equal to the rental value of the real estate, and the basis of that contention is, that the plaintiffs in error should not be prejudiced by the use of any method which presumes this fund would earn more than the land itself. That contention has been disposed of.

The judgment of the Appellate Court and the decree of the circuit court will be reversed and the cause remanded to the circuit court, with directions to enter a decree finding the value of the life estate to be \$5251.91, and of that sum to award \$5241.91 to Margaret J. Marshall and \$10 to Solomon R. Marshall, the minor.

*Reversed and remanded, with directions.*

EDWARD ROBY, Plaintiff in Error, *vs.* THE SOUTH PARK COMMISSIONERS *et al.* Defendants in Error.

*Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.*

1. **PLEADING**—*when cross-bill is proper.* Where it is necessary for a defendant to have relief concerning the subject matter of the litigation different from that sought by the complainants, or it is necessary to the defense to obtain some discovery, or where facts occurring subsequently to the filing of an answer are material to the defense, a cross-bill is the proper method of bringing such matters to the attention of the court.

2. **SAME**—*if matter is equally available by answer a cross-bill is unnecessary.* It is only when complete justice cannot be done on the original bill and answer that a cross-bill is proper, and if the same matter is equally available by answer a cross-bill is unnecessary.

3. **SAME**—*when demurrer to cross-bill is properly sustained.* A cross-bill filed by a defendant who had refused to join in the original bill though his interest was identical with the interest of the complainant therein, which alleges no facts showing a right to any other relief than that shown by the original bill, or which in any manner adds to, changes or qualifies the relief to be given under the original bill and which prays only for general equitable relief, is unnecessary and is an improper encumbrance of the record, and the court may rightfully strike it from the files or sustain a demurrer thereto.

4. **PARTIES**—*when a person may be properly made a defendant to bill.* One whose interests are identical with those of the complainant but who refuses to join in the complainant's bill may properly be made a defendant, and if in his judgment the bill does not fully or accurately set out the facts he may supply the defects by answer and introduce evidence on the hearing.

5. **SAME**—*one who has parted with all interest is not a necessary party to bill to quiet title.* A person who has parted with all interest in land is not a necessary party defendant to a bill against his grantees and others for purpose of quieting title to the land.

WRIT OF ERROR to the Superior Court of Cook county;  
the Hon. FARLIN Q. BALL, Judge, presiding.

On August 17, 1905, Charles W. Colehour filed a bill in the superior court of Cook county against the South Park Commissioners, Edward Roby, Carrie M. Colehour



and Azel F. Hatch. The bill was amended, additional parties were made, Hatch died and his administrator was substituted in his place. The defendants answered and the cause was put at issue by the filing of replications. On June 24, 1908, Edward Roby filed a cross-bill, to which a demurrer by the South Park Commissioners was sustained on July 2. Roby elected to stand by his cross-bill and it was dismissed, and after a hearing on the pleadings and evidence the original bill was also dismissed for want of equity on July 22, 1908. Separate appeals were prayed by complainant and by Edward Roby, but they were not perfected and no certificate of evidence was filed. On April 10, 1911, Edward Roby sued out a writ of error to reverse the decree.

The material averments of the original bill charge, substantially, that the complainant, Carrie M. Colehour and Edward Roby are the equitable owners of a tract of land in the east half of section 8, town 37, range 15, east, in Cook county, bordering on Lake Michigan, the legal title to which is in Carrie M. Colehour, the complainant being the owner of one-half and Carrie M. Colehour and Edward Roby each of one-fourth; that the South Park Commissioners on July 1, 1904, obtained a conveyance of a tract of land in the same section north of and adjoining the land of the complainant and his co-tenants and are in possession of the same; that the north line of the land of the complainant and his co-tenants, beginning at the intersection of the Lake Shore and Michigan Southern railroad with the south line of the north half of section 8, runs north 33 degrees and 30 minutes east to Lake Michigan, while the south line of the land described in the deed to the South Park Commissioners, beginning at the same point, runs at right angles to the railroad, so that the description contained in the deed covers a triangular piece of about three acres included between these two lines and the lake, which belongs to the complainant and his co-tenants and thus constitutes a cloud on their title.

It was also alleged that by reason of the joint efforts of the complainant and his co-tenants and of Esther E. Taylor, a former owner of the tract conveyed to the South Park Commissioners, for the improvement of the property of all of them, and for the making of all parts of said section 8 available for settlement and for residences and places of industry, commerce and profit, and by reason of their subdivision of their lands and platting the same, their general plan of improvements and of their agreements and many acts in pursuance thereof, the lands of the complainant and his co-tenants are only accessible by pedestrians and vehicles through the streets included within the land conveyed to the South Park Commissioners and they are accessible by land in no other way, and for all these reasons the said Esther E. Taylor became estopped to deny the right of complainant and his co-tenants to use all of said streets, yet the South Park Commissioners threaten to convert into a park all the land so conveyed to them, including all the streets therein, and to exclude therefrom all traffic teams and vehicles and all vehicles not within the description of pleasure vehicles, and are now at work, by their servants, with teams, wagons, scrapers and other appliances, closing and obstructing said streets.

It is further alleged that the United States has been engaged in building an artificial harbor off the mouth of the Calumet river, and that the lands of complainant and his co-tenants are within said harbor and front about 1600 feet on the waters thereof; that a dock line has been established by the United States substantially parallel to the shore line and about 2300 feet therefrom, and the right to construct and use docks and piers to that line, and all other riparian rights appurtenant to the said land, are the property of the complainant and his co-tenants, yet the South Park Commissioners claim that an act of the legislature approved on May 14, 1903, entitled "An act conveying certain lands to

the South Park Commissioners for the purpose of establishing public parks and pleasure grounds therein," is a grant of all the land covered with water between the land of the complainant and his co-tenants in section 8 and the State line of Indiana, and cuts off and divests all rights of the complainant and his co-tenants to any riparian rights in Lake Michigan and the land under the lake, and especially the right to fill or dock out to the depth of navigable water, and the South Park Commissioners threaten to build out from the land of the complainant and his co-tenants to the State line of Indiana and to occupy the water between such land and said State line, and to exclude the complainant and his co-tenants from building docks out into the water to the dock line and from using their riparian rights in any manner, though the complainant avers that the said act of the legislature is null and void. The bill also averred that the tract conveyed to the South Park Commissioners is not adjacent to any park or boulevard and that the South Park Commissioners are without authority of law to maintain said premises as a park.

The amendment to the bill introduces two new parties, Homer Potwin and Kate N. Harris, and avers that on August 19, 1903, the National Transit Company entered into a written contract to convey to Homer Potwin the land subsequently conveyed to the South Park Commissioners, and September 23, 1896, entered into a like contract with H. Prentiss Putnam, who later assigned it to Charles G. Harris, of whose will Kate N. Harris is executrix. It was averred that Roby and Carrie M. Colehour, the co-tenants of the complainant, refused to join in the bill as complainants and they were therefore made defendants. It was further alleged that Azel F. Hatch held title to the lands described in the east half of section 8, such title to be conveyed and delivered to the complainant, as sole owner, on the payment of \$8000 and accrued interest.

The prayer of the bill was that the title of the complainant and his co-tenants up to the north boundary line claimed by them, including the three-acre triangle, might be quieted; that the title of the complainant to the land covered by water in front of their land in section 8, and to all the riparian rights mentioned appurtenant to the said land, might be quieted; that the South Park Commissioners might be restrained from converting the streets in the tract conveyed to that corporation into a park, from filling up, obstructing or vacating the said streets or any of them, from excluding traffic teams or vehicles from them or any teams or vehicles from going to or from the said land of the complainant and his co-tenants, or from in any manner obstructing or interfering with the use by the complainant and his co-tenants of their said land covered with water and from the exercise of every riparian right appurtenant to said land, and for general relief.

Before the amendment to the bill making Potwin and Harris parties, Roby filed his answer on September 26, 1905, expressly admitting all the allegations of the bill except that alleging Azel F. Hatch's title, which he denied, claiming the ownership of one-fourth of all of the said lands in equity, free from all claims of said Hatch against Charles W. Colehour or of his co-tenants. Carrie M. Colehour's answer expressly admitted all the allegations of the bill except that in regard to Azel F. Hatch's title, which she denied, claimed the ownership of one-fourth of the land in equity, and united in the prayer of the bill for relief against the South Park Commissioners. The answer of Azel F. Hatch's administrator, filed April 17, 1907, set up the title held by him as security for an indebtedness of Charles W. Colehour. The answers of Potwin and Harris set up the respective contracts alleged in the amendment to the bill, allege that they are in full force, and that the South Park Commissioners had notice of them when the conveyance was received from the National Transit Company.

The answer of the South Park Commissioners denied that the line between the two tracts ran from the starting point north 33 degrees and 30 minutes east and averred that it ran at right angles to the railroad, and that for more than twenty years the latter line had been marked by a fence and pier and had been acquiesced in by the owners on either side as the true division line; denied that the lands of the complainant and his co-tenants were only accessible for pedestrians and vehicles over the streets on the tract of the South Park Commissioners, and averred that in 1888 those streets were duly vacated in conformity with the statutes and the rights of the public therein ceased; that afterward, on May 5, 1888, the said tract was conveyed by the owner thereof to the National Transit Company, and from that time until the date of its deed to the South Park Commissioners, July 1, 1904, the National Transit Company had been continuously in the open, adverse, exclusive and notorious possession of all of said premises, had paid all taxes levied thereon, and had maintained a fence on the boundary line at right angles to the railroad; that the South Park Commissioners had no knowledge of any of the acts or agreements which were claimed to estop Esther E. Taylor, and that none of such agreements were in writing or recorded. The answer admitted that the South Park Commissioners intended to convert all the lands it had acquired or might acquire into a park, but averred that it had not yet been determined in what manner the said lands should be improved, and it denied that the South Park Commissioners had threatened to build out in front of the lands of the complainant and his co-tenants in section 8, or to occupy the water between said lands and the State line of Indiana, or to exclude the complainant and his co-tenants from building docks out to the dock line of the harbor or from using their alleged riparian rights. In its answer to the amendment to the bill the South Park Commissioners set up a forfeiture of each of the contracts mentioned.

The cross-bill of Roby adopted all of the allegations of the original bill and amendments except the averment of the mortgage to Hatch. It then proceeded to describe, in great detail, the boundary line between Illinois and Indiana, the location of the dock line, the sea wall, the harbor, the frontage of the land in question on Lake Michigan and the riparian rights claimed. The chain of title to fractional section 8 was then set out substantially according to the allegations of the original bill but in very much greater detail, including several plats of the land, conveyances thereunder and the rights claimed to have been acquired by the different parties. Certain proceedings by the South Park Commissioners for condemning the land as the property of the National Transit Company, prior to the execution of the deed by the company, were set out, together with the subsequent dismissal of that suit, and the deed from the National Transit Company to the South Park Commissioners. The contracts with Putnam and Potwin were alleged as in full force and notice of them by the South Park Commissioners prior to the purchase of the land. The National Transit Company was made a party defendant. The cross-bill prayed for no specific relief but only for such relief as might be agreeable to equity.

EDWARD ROBY, *pro se*.

ROBERT REDFIELD, (TOLMAN & REDFIELD, HENRY P. CHANDLER, CHARLES L. BARTLETT, and CHAUNCEY W. MARTYN, of counsel,) for defendants in error the South Park Commissioners.

ALFRED D. EDDY, for the National Transit Company.

Mr. JUSTICE DUNN delivered the opinion of the court:

The only error assigned is on the action of the court in sustaining the demurrer to the cross-bill and dismissing the cross-bill. The cause has been argued on the part of the

plaintiff in error as if the cross-bill were an original bill and as if the only question to be determined were whether the cross-bill states such a case as entitles the complainant to some equitable relief. This is a misapprehension. The record shows that after the cross-bill was dismissed the cause was submitted for final hearing upon the original bill, (to which the plaintiff in error, having refused to join as complainant, was a defendant,) the answers and replications and the evidence, and upon a determination of the issues of fact as well as of law the court entered a decree dismissing the bill for want of equity. That bill, so far as any right to equitable relief is concerned, was substantially identical with the cross-bill. The allegations of the latter were made in some particulars with more fullness of detail, but in no material matter did they add anything of essential importance to the statements of the original bill. The cross-bill prayed for no relief not prayed for by the original bill, and, in fact, for no specific relief. Its prayer was merely a prayer for general equitable relief. The facts alleged showed no right to any other relief than that shown by the original bill. They showed nothing which could in any manner add to, change or qualify the relief to be given under the original bill. Under such circumstances the cross-bill was an unnecessary and improper encumbrance of the record, and the court might rightfully strike it from the files or sustain a demurrer to it.

A cross-bill is a mode of defense. Where it is necessary for a defendant to have relief concerning the subject matter of the litigation different from that sought by the complainants, where it is necessary to the defense to obtain some discovery or where facts occurring subsequently to the filing of an answer are material to the defense, a cross-bill is the proper method of bringing these matters to the attention of the court. It is only where complete justice can not be done on the original bill and answer that a cross-bill is proper. If the same matter is equally available by way

of answer the cross-bill is unnecessary. In *Newberry v. Blatchford*, 106 Ill. 584, the Attorney General, who was a defendant, filed an answer substantially admitting the allegations of the bill and a cross-bill asking the same relief as the original bill. It was held that the cross-bill was filed in violation of the well established chancery practice. The court said (p. 599): "The cross-bill in this case was for no purpose the law permits such a bill to be used. No discovery was sought and no relief was asked that was not attainable, if at all, on his answer. This is stating no new rule of practice. It was decided by this court as long ago as in *Morgan v. Smith*, 11 Ill. 194, a defendant will not be permitted to file a cross-bill when his rights are fully disclosed in his answer in response to the allegations of the bill and might be fully protected by the court on the hearing of the original bill, and the cross-bill of the defendant was held to have been properly stricken out of the record because it was in violation of proper practice. \* \* \* It is not understood the practice in chancery will permit a defendant to file a cross-bill praying the same thing may be done as is sought to be accomplished by the original bill. A demurrer would lie to such a cross-bill, or it might be dismissed on motion, as was done in *Morgan v. Smith*." The same rule is announced in *Wing v. Goodman*, 75 Ill. 159; *Akin v. Cassiday*, 105 id. 22; *Hook v. Richeson*, 115 id. 431; *Prichard v. Littlejohn*, 128 id. 123.

Though the interest of the plaintiff in error was identical with that of the complainant he refused to join in the bill and was therefore properly joined as a defendant. (*Smith v. Sackett*, 5 Gilm. 534; *Whitney v. Mayo*, 15 Ill. 251.) If in his judgment the bill failed to set out the facts with sufficient fullness or accuracy he could have supplied the defects by his answer. He had the right, on the hearing, to introduce evidence, and if, upon the hearing, relief had been granted to the complainant, the plaintiff in error would necessarily have received the same relief.



The presence of the National Transit Company was not necessary to the relief sought. It had no interest in the controversy. It had parted with its interest in the land. The allegations of the cross-bill show that the only persons having any interest in the land were Roby, Charles W. Colehour, Carrie M. Colehour, the South Park Commissioners, Potwin and Harris. These were all parties to the original bill, and the presence of no one else was necessary to an adjudication of all questions concerning the title.

The demurrer to the cross-bill was properly sustained, and the decree will be affirmed.

*Decree affirmed.*

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ALBERT S. C. PENNINGTON, Defendant in Error, vs. THE ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error.

*Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.*

1. CARRIERS—a carrier may limit time in which ticket may be used. A carrier of passengers may, in consideration of a reduced fare, limit the time in which a ticket may be used, and provide that if it is not used within the terms of such limitation it shall thereafter be void.

2. SAME—ticket agent has no implied authority to waive limitation after it has expired. An agent of a carrier who sells a ticket has no implied authority, after the ticket has expired by its own limitation, to waive such limitation and make a new contract with reference to its use which will bind the carrier.

3. SAME—when a conductor may lawfully require a person to leave train or pay fare. Where a person who has boarded a train presents a ticket which has expired by its own limitation the conductor may lawfully require him to pay his fare or leave the train, and he is not bound to accept the purchaser's statements concerning the ticket.

4. SAME—when a ticket is a limited ticket. A railroad ticket bearing on its face the words, "One passage \* \* \* if presented on date of sale shown on back," is a ticket limited to the date of sale, even though there is nothing upon the back of the ticket except perforations, which may be intelligible only to the carrier's employees, as such perforations are for the information of such em-

ployees and not for the information of the purchaser, who knows the day upon which he purchased the ticket and is informed by the printing on its face it must be presented "on date of sale."

5. SAME—*when carrier is not liable for injury received by a person after being required to leave train.* If the action of a conductor in requiring a person to leave the train at a station for non-payment of fare is lawful, such action cannot be made the basis of a legal liability of the carrier to respond in damages for injuries to such person from exposure after he left the train.

6. SAME—*evidence that ticket seller told purchaser that void ticket was good not admissible.* In an action for damages, based upon the alleged wrongful act of a passenger conductor in refusing to accept the ticket tendered and in requiring plaintiff to leave the train, evidence that the ticket seller from whom the plaintiff had purchased the ticket ten days before, and which was limited on its face to the date of sale, told the purchaser, when she passed him through the gate on the day he attempted to use the ticket, that the ticket was good, is not admissible, in the absence of proof that she had authority to waive the limitation.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HOMER ABBOTT, Judge, presiding.

CALHOUN, LYFORD & SHEEAN, (JOHN G. DRENNAN, and EDWARD W. RAWLINS, of counsel,) for plaintiff in error.

JOHN C. TRAINOR, (JAMES E. MCGRATH, of counsel,) for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action on the case commenced by the plaintiff in the superior court of Cook county against the defendant to recover damages alleged to have been sustained by him in consequence of his wrongful ejection at Hyde Park station, in the city of Chicago, from one of the suburban trains of the defendant upon which he was a passenger, on the evening of December 10, 1893. The general issue was

filed and a verdict was returned in the plaintiff's favor for \$4500, upon which judgment was rendered. That judgment having been affirmed by the Appellate Court for the First District, the record has been brought to this court for further review by writ of *certiorari*.

The facts are as follows: The plaintiff, on November 27, 1893, purchased for fourteen cents, of the agent of the defendant, a ticket from the Thirty-sixth street (or Douglas) station to Kensington station, which read:

"Illinois Central R. R.

One passage between

Douglas (A)

and

Kensington

On Suburban Trains only

If presented on date of sale shown on back.

A. H. HANSON, *Gen. Ticket Agent*."

Through the ticket were perforated the figures "331:3," which signified to the employees of the defendant that the ticket had been purchased on the 331st day of the year. The plaintiff did not take passage on the train of the defendant on the 27th day of November, but on the 10th of December, thirteen days later, he presented the ticket to the agent at Douglas station, and after looking at the ticket she returned the ticket to the plaintiff and opened the turnstile and admitted him to the platform, where he took passage on one of the trains of the defendant for Kensington. The plaintiff testified, over the objection of the defendant, that when he presented the ticket to the agent at Douglas station on December 10 he asked her if the ticket was good on that day and she informed him it was. When the conductor upon the train called upon the plaintiff for his fare he presented to him the ticket which he had purchased on the 27th day of November. The conductor informed him that the ticket, by its terms, had expired and that he could not receive it for his passage from Douglas station to Kensington station, and that he would

have to pay his fare (thirty-one cents) or get off the train. After some controversy over the payment of the fare between the plaintiff and conductor, the plaintiff, under protest, but without the use of force, left the train at Hyde Park station. The night was cold, and the plaintiff testified he was unable to find the station for some time, although the station and platform were well lighted, and that he froze his hands and feet, and in consequence of exposure was made sick and suffered permanent injury.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved the court for a directed verdict, which motion was denied. The action of the court in denying such motion having been assigned as error, the question arises, do the facts established by the evidence most favorable to the plaintiff, when admitted to be true, make out a cause of action in his favor? The action was in tort for the wrongful ejection of the plaintiff from the defendant's train, and if his ejection was lawful there was no legal wrong committed against him and there can be no recovery.

The law is well settled that a railroad company may, in consideration of a reduced fare, limit the time in which a ticket may be used, and provide if it is not used within the terms of such limitation it shall thereafter be void. The use of the ticket sold to the plaintiff was limited to the day upon which it was sold, and as it was not used upon the day upon which it was sold it thereafter could not be used by plaintiff. The general rule upon the subject is thus laid down by Hutchinson on Carriers, (2d ed. sec. 575,) where it is said: "When the ticket limits the time within which it must be used it will not entitle its holder to a passage after the expiration of that time. Tickets frequently provide that they shall be good for a certain number of days, and it has been often held in such cases that such words amount to a condition or to a stipulation between the carrier and the holder that if they are not used

within a specified time the right to be carried under the contract is lost and all obligation under it on the part of the carrier is at an end." It is equally well settled that the agent who sells a ticket has no implied authority, after the ticket has expired by its own limitation, to waive such limitation and make a new contract with reference to its use which will bind the carrier. This rule is thus announced in *Hutchinson on Carriers*, (vol. 2,—3d ed.—sec. 1062,) where it is said: "An agent authorized to sell railroad tickets has no implied powers after the sale of a ticket is fully completed and his duties in regard to it are at an end, and he cannot then bind the company by representations which contradict the plain terms of the ticket." In *Thompson on Negligence* (vol. 3,—2d ed.—sec. 2602,) it is said: "Mere verbal declarations of the company's ticket agent, made subsequent to the purchase of such ticket, as to its being good at any time thereafter will not constitute a valid contract, in the absence of proof that the agent had authority to make an oral contract for the company." It is therefore obvious that the ticket which was presented by the plaintiff to the conductor of the defendant's train on the tenth of December did not entitle the plaintiff to ride upon the defendant's train from Douglas station to Kensington station.

The question then arises, was the conductor of the defendant's train legally justified in requiring the plaintiff to leave the train for the non-payment of fare? In *Chicago, Burlington and Quincy Railroad Co. v. Griffin*, 68 Ill. 499, the plaintiff purchased a ticket at Mendota from Mendota to Earl. The ticket agent made a mistake and gave him a ticket from Mendota to Meriden. The conductor upon the train upon which the plaintiff took passage insisted on the plaintiff paying his fare from Meriden to Earl, which he declined to do, and the conductor ejected him from the train, and it was held the conductor had the lawful right to collect fare from Meriden to Earl, and upon the refusal

of the plaintiff to pay such fare, although he had paid the agent at Mendota his fare from Mendota to Earl, to eject him from the train, and that the conductor was not bound to accept the statement of the plaintiff that he had paid his fare from Mendota to Earl. It is urged that the ticket purchased by plaintiff in this case was not limited. There is no force in this contention. It stated upon its face that it was good for "one passage \* \* \* if presented on the date of sale." True, the date of sale was not shown on the back of the ticket in such language as was intelligible to the plaintiff, but the perforations on the back of the ticket were placed there for the information of the employees of the defendant and not for the information of the plaintiff, as the plaintiff knew the day upon which he purchased the ticket, and the printing upon the face of the ticket informed him in plain language that the ticket was not good after the date upon which he purchased the same; and if he was misled by the ticket agent at the Douglas station turnstile, upon boarding the train he was immediately advised by the conductor that the ticket had expired by its own limitations and was not good on that date and would not be received for his passage from Douglas station to Kensington station. It is clear that the conductor of the defendant's train was well within his legal rights in requiring the plaintiff to pay his fare from Douglas station to Kensington station or to leave the train, and as he was guilty of no legal wrong in requiring the plaintiff to leave the train at Hyde Park there was no legal liability resting upon the defendant by reason of his ejection at that station, and there can be no recovery for an injury received by plaintiff in consequence of his being required to leave the train at Hyde Park.

It was error for the court to admit in evidence the conversation of the plaintiff with the ticket seller at the Douglas station, as the ticket seller at the time was powerless to bind the defendant by an admission that the ticket was good upon that date. The Supreme Court of Iowa, in *Han-*

*lon v. Illinois Central Railroad Co.* 109 Iowa, 136, in considering the power of a ticket seller to bind the railroad company after the ticket had been sold and paid for, used the following language: "It is insisted that as the ticket agent at Sioux City was authorized to and did sell the ticket in question, his representations to the effect that it would be good and might be used for transportation after the expiration of one day from the date of sale were binding upon the defendant. It will be observed that the representations of the agent were not made at the time the ticket was sold but on the next day, although within twenty-four hours after the hour of the sale. The petition does not allege that the ticket agent had any actual or apparent power to bind the defendant by the representations made, and we are required to determine whether an agent authorized to sell railroad tickets has the implied power to bind the railway company, after the sale is fully completed and his duties in regard to it are at an end, by representations which contradict the plain terms of the ticket sold. We are of the opinion that but one answer can be made to that question. As a general rule, a special agent can bind his principal by declarations only when they are made within the scope of his employment and at the time of performing the duties to which they relate. An agent whose duty it is to sell tickets for his principal has no implied power to construe the contract after the sale is fully completed and nothing remains for the agent to do."

As there can be no recovery in this case the judgments of the superior and Appellate Courts will be reversed without remanding the case.

*Judgment reversed.*

OWEN S. JONES, Appellee, vs. THE SANITARY DISTRICT OF CHICAGO, Appellant.

*Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.*

1. **APPEALS AND ERRORS**—*when a freehold is involved in action on the case.* In an action by a land owner against a sanitary district for damages to the land from overflow, if the defendant by its plea denies the plaintiff's allegation of ownership and the question of ownership is proved and determined a freehold is involved, notwithstanding the defendant, on appeal, concedes the question of title and does not desire to further contest that point.

2. **DAMAGES**—*when all damages from permanent structure can not be recovered in one suit.* Where the continuance and operation of a permanent structure is not necessarily injurious to land but may or may not be so, according to the manner of its operation and the action of the forces of nature, only the injury sustained before beginning the suit can be compensated in that suit.

3. **SAME**—*permanency of the injury, and not the permanency of the cause, is the test—limitations.* It is the permanency of the injury, and not merely the permanency of the structure causing the injury, which is the test in determining whether damages for all time to come may be recovered in one action; and it is the injury which is the cause of action, and the Statute of Limitations does not begin to run until the cause of action accrues.

4. **SAME**—*when injury is not necessarily of a permanent character.* Where a declaration charges that since the construction and operation of the channel of a sanitary district the lands of the plaintiff have been subject to more and greater overflow than before, and that such overflow is intermittent and recurrent, the injury cannot be said to be of such a permanent character as requires the plaintiff to recover all damages in one suit, and as fixes the time the channel was opened as the time when the Statute of Limitations began to run. (*Suehr v. Sanitary District*, 242 Ill. 496, distinguished.)

5. **SAME**—*measure of damages in case of permanent injury to realty.* In case of a permanent injury to realty the measure of damages is the difference between the value of the land before the injury and its value afterward; but such is not the rule where the injury is not permanent, and in such case the measure of damages is the actual loss sustained during the continuance of the injury.

6. **SAME**—*when rule applicable to shade and ornamental trees does not apply.* The rule that where fruit or ornamental trees are destroyed by the flooding of lands the measure of damages is the diminished value of the land does not apply where the trees de-



stroyed are ordinary forest trees having a value for lumber, which can be readily ascertained and proven.

7. *SAME—when plaintiff may prove value of timber destroyed and yearly value of pasture lands.* In an action against a sanitary district for damages to lands of the plaintiff alleged to be flooded intermittently and recurrently, the plaintiff may prove the value of the timber destroyed and the value, per acre, of the pasture lands for each of the five years during the continuance of the injury and preceding the commencement of the suit.

8. *SANITARY DISTRICTS—when a sanitary district is liable for damage from overflow.* If, by reason of the flow of waters from a sanitary district channel into a connecting river, lands are overflowed and injured the district is liable to the owner of such lands, irrespective of whether the district has been guilty of any negligent act in the management of the waters of the drainage channel.

9. *SAME—fact that flood contributed to injury does not defeat recovery from sanitary district.* The fact that an unusual flood occurring after the opening of the channel of a sanitary district may have contributed to the destruction of the timber on plaintiff's land does not defeat a recovery from the defendant sanitary district, where the evidence shows with equal conclusiveness that the timber would not have been destroyed but for the subsequent intermittent overflow of the lands, caused by the discharge of water from the defendant district's channel.

10. *SAME—extent to which statute authorizing work is a protection.* If the act or work authorized by the legislature is done or constructed within the scope of the power granted, the grant operates as a protection against indictment or suit for any injury which is a necessary and probable result thereof; but beyond such probable consequences the legislative authority is no protection.

11. *SAME—when giving instructions not based on evidence will not reverse.* Giving instructions authorizing a recovery against a sanitary district if it has been guilty of negligence in the management of the waters of the channel is not ground for reversal even though there is no evidence of negligence, where the district is liable irrespective of the question of negligence and there is a count in the declaration alleging such liability.

12. *SAME—when recovery of attorneys' fees is authorized.* An action against a sanitary district to recover damages for timber killed and the loss of the use of pasture land caused by the intermittent and recurrent overflow of the land is for damages to real estate, within the meaning of section 19 of the Sanitary District act, and the plaintiff is entitled to recover his attorneys' fees.

HAND, J., CARTER, C. J., and CARTWRIGHT, J., dissenting.

APPEAL from the Superior Court of Cook county; the Hon. DUANE J. CARNES, Judge, presiding.

CHIPERFIELD & CHIPERFIELD, FRANK J. QUINN, JAMES S. HANDY, and WALTER E. BEEBE, (JOHN C. WILLIAMS, and P. C. HALEY, of counsel,) for appellant.

PEASE, SMETANKA & POLKEY, (WARREN PEASE, and CHARLES P. MOLTHROP, of counsel,) for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

This is an action on the case brought by Owen S. Jones, appellee, against the Sanitary District of Chicago, appellant, in the superior court of Cook county. The original declaration consisted of one count, and was filed March 17, 1908. It alleged that appellee was, and had been for more than five years prior to the commencement of the suit, the owner in fee simple of 1976 acres of land in Cass county; that prior to the commission of the acts complained of, said land was covered by timber, the lumber of which was used for commercial and manufacturing purposes; that appellant in 1900 turned the waters of Lake Michigan and the Chicago river into the tributaries of the Illinois river, having theretofore, by virtue of authority conferred on it by law, cut certain channels connecting the said Chicago river with the tributaries of the Illinois river; that the flow of water through said channel and into the Illinois river was under the control of appellant, which might at all times regulate the same by means of certain appliances; that at various times during the five years prior to the commencement of the suit large quantities of water were caused to flow from Lake Michigan and the Chicago river into the Illinois river; that the lands of appellee lie adjacent to the Illinois river, in Cass county, and were overflowed as a result of this addition to the waters of the Illinois river; that because of the wrongful acts of appellant and the careless

and negligent management of said waters, and because of the increased flow into the Illinois river, the lands of appellee were overflowed for the greater portion of each year, causing large quantities of appellee's timber to die and rendering his land unfit for grazing and agricultural purposes. Subsequently appellee filed an additional count, in which he alleged that his lands were covered by timber of great value and in a lively and flourishing condition on March 17, 1903, and at that date, and at all times thereafter, appellant had caused the waters of Lake Michigan to flow through its drainage canal into the Illinois river, whereby the amount of water in said river had been greatly increased during the period from March 17, 1903, to the time of the beginning of the suit. The additional count further alleged that the canal was constructed and operated by appellant under a statute giving it power to do so, and which provided that it should be liable for all damage to real estate which should be overflowed or otherwise damaged by reason of the construction, enlargement or use of such channel. It contained the same allegations with reference to overflowing the lands as the original count, except that it did not charge that the overflowing of the lands was caused by any negligent act on the part of appellant. To both counts of the declaration appellant filed the general issue, a plea denying that appellee was the owner in fee simple of the lands described and a plea of the Statute of Limitations. A demurrer was sustained to the plea of the Statute of Limitations and appellant stood by its plea. The plea of the Statute of Limitations set up the organization of the sanitary district under the act of 1889, entitled "An act to create sanitary districts and to remove obstructions in the Desplaines and Illinois rivers;" that any channel constructed under the provisions of this act should be of certain size and capacity, and that in the event of its operation a continuous flow of 200,000 cubic feet of water per minute should be produced and maintained, and 20,000 cubic feet of water per minute ad-

ditional for every 100,000 inhabitants of the said district exceeding 1,500,000; that the channel was constructed pursuant to such authority, and that from January 17, 1900, when the channel was opened, there has been discharged through said channel into the Desplaines river the quantity of water required by the statute, to-wit, 300,000 cubic feet per minute; that the construction of the channel was and is a permanent work and was done in a skillful, prudent and workmanlike manner, and that from the time of the opening of said channel to the present time the flow of water required has been continuously maintained, and that any damage sustained by appellee was caused by the construction of the channel and the turning in of the water on January 17, 1900. Issues were joined on the plea of general issue and the plea denying appellee's title to the lands, and a trial resulted in a verdict for the appellee for \$6250. Subsequently, appellee, under section 19 of the act of 1889, relating to sanitary districts, moved the court to fix his attorneys' fees, and upon a hearing the court allowed \$3000 to appellee for his attorneys' fees and entered judgment on the verdict and for the amount of the fees. From that judgment appellant prayed an appeal to the Appellate Court for the First District, where, on motion of appellee, the cause was transferred to this court on the ground that a freehold is involved.

Appellant contends (1) that a freehold is not involved and that the cause should be re-transferred to the Appellate Court; (2) that the demurrer to the plea of the Statute of Limitations should have been overruled; (3) that the measure of damages adopted was improper; (4) that the verdict is against the weight of the evidence; (5) that the court erred in allowing appellee's attorneys' fees; and (6) that the court erred in giving and refusing instructions.

This is a suit for damages to real estate, and it was necessary that appellee allege and prove his ownership. In both the original declaration and in the additional count appellee

alleges that he owned the land in question at the time of the alleged trespasses. Appellant filed a plea denying that at the time of the beginning of the suit and during the time of the commission of the alleged offenses appellee was the owner of the lands. On the trial, to maintain the issues on his part, appellee made proof of his title, and the court instructed the jury that it was incumbent upon him to prove that during the five years next preceding March 17, 1908, he was the owner in fee simple of the lands described in the declaration. Appellant asked an instruction directing the jury to find it not guilty, for the reason that appellee had failed to show by competent evidence that he was the owner in fee of the lands described in the declaration; but this instruction was properly refused, for the reason that appellee had sufficiently proven his ownership. We have repeatedly held that when a freehold is so put in issue that a decision of the case necessarily involves a decision of that question, this court has jurisdiction on direct appeal. (*Monroe v. VanMeter*, 100 Ill. 347; *Piper v. Connelly*, 108 id. 646; *Malaer v. Hudgens*, 130 id. 225; *Van-Tassell v. Wakefield*, 214 id. 205; *Wachsmuth v. Penn Mutual Life Ins. Co.* 231 id. 29; *Schwitters v. Barnes*, 243 id. 493.) In this case, by filing its plea denying appellee's title the freehold was directly put in issue, and a decision of the case necessarily involved a decision of that issue. It is immaterial that appellant now concedes the title of appellee and does not care to further contest that point. It was a material issue in the trial court, and, being an action at law, the issues there determine the jurisdiction of this court on appeal. A freehold is involved within the meaning of the constitution, and the cause was properly transferred to this court.

The contention that the court erred in sustaining the demurrer to the plea of the Statute of Limitations is based upon the claim that as the building of the drainage canal is authorized by an act of the legislature and is permanent

in its character, the injury inflicted upon appellee, if any, is permanent, and he is limited to one cause of action for the recovery of all damages, past, present and prospective, and that his right of action accrued more than five years before the commencement of the suit. In support of this contention appellant relies on the class of cases which hold that when the original nuisance or cause is of a permanent character, so that the damage inflicted is of a permanent character and goes to the entire destruction of the estate affected thereby, the recovery not only may, but must, be had for the entire damage in one action, as the damage is deemed to be original. In those cases the injured lands were adjacent to the structure complained of, so that its construction necessarily and immediately destroyed or depreciated their value. This case does not fall within that class. The improvement known as the drainage channel is permanent in character, but it is not alleged that appellee suffered damage by reason of its construction. The construction and continuance of the channel more than two hundred miles from appellee's land is not necessarily an injury. It is the use that has been made of it that it is complained has caused the injury. The declaration alleges that the lands of appellee have been overflowed but a portion of each year. This might be caused by the emptying of more water from the channel into the river at some time than at others, or it might be the result of the confluence of the waters of the drainage channel with those of a freshet, or with the waters which cause an annual rise in our rivers. In either event it is contingent whether the lands of appellee shall suffer damage,—in the one case upon the action of those in control of the flow of water from the drainage channel, and in the other upon the action of nature. If the flooding was the result of the first named cause, then it was due to the negligent management of the flow through the channel, as the statute provides for a constant flow, which is not to be increased except as the popu-

lation of the district increases, in which case the increase will be permanent and the flow will still be constant. The fact that the channel is a permanent improvement does not, of itself, serve to determine when, if ever, or to what extent, injury will be suffered. That the injury complained of is not necessarily caused by the construction or existence of this permanent improvement is evidenced by the fact that at times the river is within its banks and the lands of appellee are not overflowed. If, as appellant contends, the Statute of Limitations runs as to such actions as this from the date the drainage channel was completed to Lockport and the flow of water turned on, it is possible for a party to be barred before he has suffered any injury whatever. It is the injury sustained which is the cause of action, and the statute does not begin to run before the cause of action accrues. The permanency of the injury is the test as to whether damages for all time must be assessed. In this case the declaration alleges that the flooding was intermittent and recurring. Both the declaration and the plea refer to the act of 1889, under which the district was organized. An examination of that act and the supplemental act of 1901, to extend the powers of sanitary districts, discloses that it was contemplated by the legislature that everything possible should be done to keep the waters of the sanitary district within the banks of the stream into which they empty, and the district was invested with extraordinary powers to accomplish this purpose and thus prevent the flooding of the adjacent bottom lands. An exhaustive discussion of the scope and purposes of the act of 1889 is found in *People v. Nelson*, 133 Ill. 565. While the plea states with particularity the construction and completion of its channel to Lockport and the flow of water which has been maintained at that point from its channel into the Desplaines river, it does not allege that any further work has been prosecuted or any attempt made to provide for keeping the waters of the district within the banks of the

Illinois river, or whether it is possible to so confine its waters. While, as the plea alleges, the channel of appellant was built under authority of law and may have been constructed in a proper and skillful manner, yet its continuance and operation, under the allegations of the declaration, will not necessarily result in injury to the lands of the appellee. Where the continuance and operation of a permanent structure are not necessarily injurious but may or may not be so, then only the injury sustained prior to the commencement of the suit may be compensated in that suit. *Sanitary District v. Ray*, 199 Ill. 63; *Valley Railway Co. v. Franz*, 43 Ohio St. 623; *Town of Troy v. Cheshire Co.* 23 N. H. 83; 2 Greenleaf on Evidence, (14th ed.) sec. 433.

Appellee cites a number of cases holding that under certain circumstances one has the right to elect whether to sue for permanent or temporary injuries, the latest being *Strange v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 245 Ill. 246. These cases are of value in determining the circumstances or conditions under which damages for a temporary injury may be recovered, but as the appellee, under the facts alleged, had the right to sue for injury suffered during the five years next preceding the commencement of his suit, it is not necessary to determine whether this is of that class of cases where he might have elected to recover for permanent injuries.

Appellant relies upon *Suehr v. Sanitary District*, 242 Ill. 496, as sustaining its contention that appellee's injuries are of a permanent character. In the *Suehr* case the injuries sustained were quite different from those alleged here. In that case Suehr undoubtedly suffered a permanent injury. His ford connecting the island with the main land was destroyed. A part of the island was washed away, including the timber along its edges, and its arable lands were largely submerged and its uses for agricultural purposes were largely destroyed. The injury sustained in that case was clearly of a permanent character, but the facts alleged in



this case are essentially different and do not bring it within the rule there announced.

Appellant contends that the only theory upon which appellee could recover was that the work of appellant was a nuisance and had not been constructed in accordance with law and in a careful and proper manner, whereas the work of the sanitary district, being permanent in character and authorized by the legislature, cannot be a nuisance when constructed properly. As a general proposition it is true that that which is authorized by the legislature cannot be a nuisance, but that statement is subject to some qualifications. If the act or work authorized is done or constructed within the scope of the power granted, any injury which is a necessary and probable result of the act so done in pursuance of legislative authority may be fairly said to be covered, in legal contemplation, by the legislature conferring power, and the grant operates as a protection against indictment or suit therefor. (2 Wood on Nuisances, p. 1046.) "It is only against such consequences as are fairly within the contemplation of the legislature in conferring the authority, and such results as are necessarily incident to its being done,—in other words, such results as are the natural and probable consequence of an exercise of the power at all,—that the grant operates as a protection. Beyond that it affords no protection whatever. It is sometimes laid down in elementary works and appears in the opinions of courts that that which is authorized by the legislature cannot be a nuisance. This is clearly erroneous in the sense in which it is generally understood. That which is authorized by the legislature, within the strict scope of the power given, can not be a public nuisance, but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom." (2 Wood on Nuisances, p. 1058.)

As the injury counted on was not the immediate and direct result of the construction of the drainage channel but

was consequential and resulted from the recurrent and intermittent overflow of the lands of appellee, the demurrer to the plea of the Statute of Limitations was properly sustained.

Appellant next contends that the court adopted an improper measure of damages. Appellee was permitted to prove the extent of the damage done to his timber and to his pasture land, and to prove the market value of the timber destroyed and the value of his pasture lands, per acre, for each of the five years next preceding the commencement of the suit. Appellant contends that the correct measure of damages is the difference in value of the land before the same was overflowed and its value afterwards. Appellant bases this argument upon the fact, as it claims, that the injury appellee has suffered, if any, is of a permanent character, and all of the cases cited by it in support of its contention on this point are cases where permanent damages were sued for and recovered. In a case of permanent injury to realty there can be no question but that the measure of damages contended for by appellant is the correct one, but here appellee was not suing for permanent injury to his real estate, and his measure of damages was the actual loss sustained during the continuance of the injury. (3 Sedgwick on Damages,—8th ed.—secs. 933, 942.) Appellant also cites cases to the effect that when fruit or ornamental trees are destroyed, as they are of little or no value when severed from the realty, the measure of damages is the diminished value of the land. In this case appellee did not sue for damage to fruit or ornamental trees. The only trees alleged or proven to have been destroyed were the ordinary forest trees, which had no value except for the production of lumber. The market value of such trees is easily ascertained and was proven in this case. "A party may be content to accept the market value of the thing taken when he is also entitled to recover for the injury done to the freehold, but if he asserts his right to go beyond

the value of the thing taken or destroyed after severance from the freehold, so as to secure compensation for damage done to his land because of it, then the measure of damages is the difference in the value of the land before and after the injury." (*Dwight v. E. C. & N. R. R. Co.* 132 N. Y. 199.) "If the thing destroyed, although it is a part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be of the value of the thing thus destroyed and not for the difference in the value of the land before and after such destruction." (3 Sutherland on Damages,—3d ed.—sec. 1015.) The same author in the same volume, at section 1049, says: "For injury done to the plaintiff's crops by flooding his lands he is entitled to recover their value standing upon it so far as they are destroyed and the depreciation in value of such as are only injured or partially destroyed. \* \* \* If the growth of grass is prevented and the owner is deprived of the use of the pasture for a considerable time, his damages are measured 'by the value of the use of the land for pasturage in the condition' it would have been but for the wrong done." (See, also, *City of Chicago v. Huenerbein*, 85 Ill. 594; *United States v. Taylor*, 35 Fed. Rep. 484.) The proper measure of damages was applied.

Appellant contends that the verdict is not sustained by the evidence, and under this point argues but two propositions: First, that the evidence discloses that all the damage done was by reason of the flood of 1902, more than five years prior to the commencement of this action; and second, that as there was no proof of negligence on the part of appellant in the management of the waters in the sanitary channel, the peremptory instruction offered by it at the close of plaintiff's evidence, and again at the close of all the evidence, should have been given.

The evidence on the part of appellee tended to prove that prior to the turning into the Illinois river of the water

of the drainage channel, in 1900, his land had been subject to the annual spring overflow of the Illinois river, but that since that time the annual overflow was increased and prolonged by reason of the presence of the waters of the sanitary district, and that his injury is occasioned by the waters remaining over his lands until the months of July and August, instead of the first of June, as theretofore. The evidence disclosed that the greatest flood since the waters of the sanitary district were turned in, in 1900, and before the commencement of the suit, was in 1902. That year the rainfall was heavier than usual and the water remained upon appellee's land for two hundred and seventy-six days, and it is the theory of appellant that it was this flood which caused the timber of appellee to die on the stump. The proof tended strongly to show that none of appellee's timber was killed as the result of one flooding, but that it required successive and repeated flooding to finally kill the trees. While it appears conclusively that the flood of 1902 contributed to the destruction of appellee's timber, still it appears just as conclusively that had no other floods occurred the timber would not have died by reason of that one flood, alone. From this it is shown that the injury to appellee was accomplished by reason of the floods which occurred within five years prior to the commencement of the suit, and is not attributable, as appellant contends, to the flood of 1902, alone.

As to the second contention of appellant under this point, it is true that there is little, if any, proof in the record of negligence on the part of appellant in the management of the flow of the waters from the channel into the Desplaines river. The only proof at all that can be said to have any bearing on that question is found in the testimony of George M. Wisner, the chief engineer of the sanitary district. He testified that since the channel was opened, on January 17, 1900, the amount of water that had been allowed to pass through the controlling works

at Lockport varied considerably, but that he would say it averaged 300,000 cubic feet per minute. Mr. Wisner was produced as a witness for appellee, but he did not testify how much nor at what times the flow varied from 300,000 cubic feet per minute. There was not sufficient ground in this testimony upon which to base a verdict that appellant had been negligent in allowing excessive amounts of water to pass through its controlling works at Lockport at the times the appellee's lands were flooded and that the floods were thus produced. Appellant's argument proceeds upon the theory that unless appellee has shown it to be guilty of negligence he is not entitled to recover. This is not correct. While the original count of the declaration charged appellant with negligence, the additional count does not so charge, and appellee is entitled to recover if he has been damaged, irrespective of whether appellant has been guilty of any negligent act. It is no defense for appellant to say that it was in the exercise of due care and caution in the management of the waters of the drainage channel. If, by reason of the flow of waters from the drainage district into the Illinois river, the lands of appellee have been overflowed and injured, appellant is liable. The peremptory instruction was properly refused.

Appellant objects to the giving of five instructions asked on behalf of the appellee. These instructions are all on the question of negligence and the lack of exercise of due care on the part of appellant, and it will not be necessary to set them out in full. The effect of each one of them was, that if the jury found that appellant had been guilty of negligence in the construction and operation of its channel and appurtenances or had not exercised reasonable care in that behalf, and that by reason thereof appellee's premises were injured, he was entitled to recover compensation. While, as we have noted, there is no evidence of negligence in this record, and these instructions should not, therefore, have been asked or given, we are unable to see wherein

appellant has been prejudiced by the giving of them. To thus narrow the right of the recovery inured to the benefit of appellant and did not prejudice it. In one of these instructions the jury were told that appellant, under the law of this State, was granted the power of eminent domain,—otherwise known as the power of condemnation,—to condemn property and appropriate for its use any land or the bed of any water-course within or without its drainage district, if it should deem it necessary and advisable for the construction, improving and carrying on of its sanitary channel, and if they found, from the evidence, that appellant, by the exercise of that right, could have made provision for the waters which it carried through its channel and emptied in the Desplaines river during the five years next preceding the commencement of the suit, and could thereby have provided for the carrying off of such waters, so that, in and of themselves, they could have caused no damage to appellee's trees and pasturage, the failure to exercise such right of eminent domain and so control such waters would authorize the jury to return a verdict in favor of appellee. While it is true that the statute grants appellant the power of eminent domain as stated in the instruction, there is no proof whatever in this record as to whether any attempt was made on behalf of appellant to exercise that right or to make any effort to deepen or widen the channel of the Illinois river, unless the same could be inferred from the testimony of Wisner, who testified that the construction of the channel had proceeded only as far as the city of Joliet, except that the dam at Kampville had been lowered, nor is there any proof that the situation would have been different had that been done. While this instruction should not have been given, we do not deem it so prejudicial as to warrant a reversal of the judgment.

The refusal of two instructions asked on behalf of appellant is also complained of. It is sufficient, in answer to appellant's contention in this regard, to say that the sub-

stance of those two instructions was contained in others given in the series, and for that reason they were properly refused.

Appellant finally contends that the court improperly assessed attorneys' fees in this case, and in support of this contention says that if the measure of damages is as held by the court then this is not an action to recover damages to real estate, and the court was not warranted, under section 19 of the act of 1889, in assessing attorneys' fees. Section 19 provides that every sanitary district shall be liable for all damages to real estate, within or without the district, which shall be overflowed or otherwise damaged by reason of the construction, enlargement or use of any channel, ditch, drain, outlet or other improvement under the provisions of the act, and that in case judgment is rendered against the district for damages, the plaintiff shall also recover his reasonable attorneys' fees to be taxed as costs in the suit. This is clearly a case coming within the provisions of section 19, and appellee's attorneys' fees were properly taxed. No objection is made to the amount of the fees, the contention being, simply, that the court had no power to assess fees at all.

There being no reversible error in the record the judgment of the superior court is affirmed.

*Judgment affirmed.*

HAND, J., CARTER, C. J. and CARTWRIGHT, J., dissenting:

We are of the opinion under the averments of the declaration the main channel of the sanitary district is a permanent improvement and that the Statute of Limitations commenced to run from the date the water was turned into the said channel, and that the court erred in sustaining a demurrer to the plea setting up the five year Statute of Limitations. *Chicago and Eastern Illinois Railroad Co. v. Loeb*, 118 Ill. 203; *Suehr v. Sanitary District*, 242 id. 496; *Miller v. Sanitary District*, 242 id. 321.

NELS O. HULTBERG *et al.* Defendants in Error, *vs.* PETER  
H. ANDERSON *et al.* Plaintiffs in Error.

*Opinion filed December 21, 1911—Rehearing denied Feb. 7, 1912.*

1. **CONSTITUTIONAL LAW**—*a party is not only entitled to notice but also to a hearing.* Under the due process of law provision of the constitution a party is not only entitled to notice of a proceeding against him but is also entitled to be heard in his defense.

2. **JUDGMENTS AND DECREES**—*when judgment is merely the arbitrary edict of the judge.* A judgment pronounced without any judicial determination of the facts which alone can support such a judgment is merely the arbitrary edict of the judge, and is as much wanting in due process of law as though the party against whom it was rendered had not been served with legal process.

3. **SAME**—*what is not a denial of due process of law.* The fact that the Supreme Court, in affirming a decree entering judgment on an arbitrator's award and dismissing cross-bills to impeach the award, disposed of the contentions against the validity of the award upon the ground that they presented questions upon which the parties were foreclosed by their agreement to arbitrate, does not amount to a denial of a hearing upon such matters, such as would render the original decree void under the due process of law provision of the constitution.

4. **EQUITY**—*when cross-bill cannot be sustained as a bill of review for newly discovered evidence.* A cross-bill in a creditor's bill proceeding cannot be sustained as a bill of review for newly discovered evidence where the cross-bill is not sworn to, and there is no affidavit filed with the bill, or any other showing made, that the cross-complainants have any new evidence to present, the only claim being that the matter of accounting was not fully gone into in the original suit.

5. **SAME**—*when bill of review for error apparent on face of record cannot be maintained.* A cross-bill in a creditor's bill proceeding cannot be sustained as a bill of review for errors apparent on the face of the record of the original proceeding, where such record has already been reviewed and the decree affirmed by an appellate tribunal.

6. **SAME**—*when court will not inquire whether former decree was just and equitable.* Where a bill is filed to carry into execution a former decree which is incomplete or defective to such an extent that it cannot be executed without a further decree curing the defect and making it complete, the court will inquire whether



the former decree is just and equitable; but this rule has no application to decrees that are complete and free from any inherent defect which prevents their execution.

7. SAME—*court will not open issues upon filing a creditor's bill to remove fraudulent conveyances.* Upon the filing of a creditor's bill to set aside an alleged fraudulent conveyance and subject the property to the payment of a decree which is complete and final, the court will not open up the issues which were tried in the original proceeding and re-try them.

HAND and CARTWRIGHT, JJ., dissenting.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

CHYTRAUS, HEALY & FROST, for plaintiffs in error.

WINSTON, PAYNE, STRAWN & SHAW, and HARRIS F. WILLIAMS, (N. SODERBERG, of counsel,) for defendants in error.

Mr. JUSTICE VICKERS delivered the opinion of the court:

On July 1, 1904, Nels O. Hultberg and the Swedish Evangelical Mission Covenant of America (hereinafter called the Covenant for convenience) filed their joint creditor's bill in the circuit court of Cook county against Peter H. Anderson, his wife, Frideborg A. Anderson, Claes W. Johnson, Adolph Bernard, the White Star Mining Company, the Chamber of Commerce Safety Vault Company, the State Bank of Chicago, the Brazilian Diamond, Gold and Developing Company and the Chicago Title and Trust Company, for the purpose of reaching certain property which complainants claim should be applied toward the payment of a decree previously entered by the circuit court of Cook county against Peter H. Anderson. The defendants to the bill other than Peter H. Anderson were made parties defendant, for the reason that they had, or were supposed to have, in their possession or control certain property, money or other assets in which the said Ander-

son was alleged to have some title or interest held or controlled by said defendants for said Anderson in trust, resulting from fraudulent conveyances or dispositions made by said Anderson which ought in equity to be set aside and canceled and said property subjected to the payment of complainants' debt. The only relief prayed for in the original bill was the cancellation of certain alleged fraudulent conveyances made by Anderson and for a decree subjecting the property to the payment of the decree against said Anderson. The cause was continued from term to term of the circuit court, during which time numerous unimportant orders were made, until February 18, 1908, when Peter H. Anderson and the mining company filed their answer and obtained an order granting them leave to file a cross-bill, which was filed on February 21, 1908. The answer of Anderson and the mining company and their cross-bill contain substantially the same allegations. Hultberg and the Covenant made a motion to strike the cross-bill from the files, which motion was by the court referred to a master in chancery, who reported recommending that the cross-bill be stricken. This motion was afterwards sustained by the court, and the cross-bill, in which Claes W. Johnson was joined as complainant, was dismissed. To reverse this order striking their cross-bill from the files, the mining company, Anderson and Johnson have sued out the present writ of error.

The suit at bar grows out of a controversy that has been going on between Anderson on the one hand and Hultberg and the Covenant on the other for a number of years. In order to understand the questions that are here involved it will be necessary to state, in a general way, the previous history of the controversy between the parties.

In the summer of 1897 Peter H. Anderson was sent out from Chicago as a missionary by the Covenant to do christian mission work among the natives of Alaska. His mission was located at Chinik, where he arrived to enter

upon his work late in the summer of 1897. In the summer of 1898 prospecting parties sent out from Chinik discovered gold in paying quantities on Anvil creek. Numerous claims were staked out and development work followed. Among other claims that were staked on Anvil creek was No. 9 Above, the legal title to which was conveyed to Anderson in pursuance to previous arrangement made with the party who staked out the claim. No. 9 Above was worked by Anderson and considerable quantities of gold were taken out by him until 1902, when he organized the White Star Mining Company of California, with a capital stock of 500,000 shares, all of which were owned by Anderson except three shares. During the year 1902 No. 9 Above was worked by Johnson under the name of the corporation which Anderson had organized. The net profits of the mine for that year were approximately \$80,000. Early in the year 1903 Anderson transferred all of the stock in the White Star Mining Company of California to Claes W. Johnson for a stated consideration of \$100,000. In May, 1903, Johnson organized the White Star Mining Company of Illinois, with a capital stock of \$25,000, to which last named company he caused the mining claim No. 9 Above to be conveyed by the California company. During the year 1903 the White Star Mining Company of Illinois operated the claim at a net profit of \$75,000. After No. 9 Above became known as a valuable property the Covenant set up a claim to the equitable ownership of said claim, basing its right on two grounds: (1) That Anderson having been sent out by the Covenant, it was entitled in equity to any property he might acquire or profits which he might make in connection with his missionary work; (2) that said No. 9 Above was, in fact, staked out and the title thereto taken by Anderson in trust for the Covenant. These claims put forward by the Covenant constitute the foundation of the present as well as of all previous controversies between the parties. In 1903 the

Covenant assigned its claim, both to the mining property and to the proceeds that had been taken therefrom, to Nels O. Hultberg. On August 12, 1903, Hultberg, Johnson, Anderson and the White Star Mining Company of Illinois entered into an arbitration agreement to submit all matters in controversy between them respecting the title to the mining property, and the produce thereof, to the decision of three arbitrators to be selected as provided in said agreement. David F. Lane of California and Abram M. Pence of Chicago were selected by the parties as two of the arbitrators, and they chose Hiram T. Gilbert of Chicago as the third. After hearing the cause, on April 13, 1904, the arbitrators Gilbert and Lane made an award finding that Hultberg was the owner of claim No. 9 Above and entitled to a conveyance thereof and that Anderson had received \$232,200 net proceeds from said mine, and ordered him to immediately pay that sum to Hultberg. The award also found that Johnson and the White Star Mining Company of Illinois were indebted to Hultberg in the sum of \$26,000, less some small deductions, which they were ordered to pay to him. Johnson and the White Star Mining Company of Illinois paid the amount of the award against them but did not convey the title of the mine to Hultberg. Soon after the making of the award Hultberg filed a bill in the circuit court of Cook county for the purpose of having judgment entered upon the award, as provided in the statute. The White Star Mining Company filed a bill in the superior court of Cook county for the purpose of having the award of the arbitrators set aside and to have the title to the mining property established as against the claim of Hultberg and the Covenant, and for an injunction and other relief. This bill was amended and by agreement of parties transferred to the circuit court, to be heard in connection with the suit of Hultberg to carry the award into execution. Johnson and Anderson filed cross-bills attacking the award on substantially the same

grounds as those upon which the bill of the White Star Mining Company was predicated. Upon a final hearing in open court a decree was entered in the consolidated cause dismissing the original and the amended bill of the White Star Mining Company and the cross-bills of Johnson and Anderson and granting the relief prayed in the bill of Hultberg. The decree found that Peter H. Anderson was indebted to Hultberg in the sum of \$232,200, with interest at the rate of five per cent from the date of the award, and ordered him to forthwith pay the same, and in default directed that execution should issue upon said decree. There was also a decree against the White Star Mining Company and Johnson in accordance with the award of the arbitrators. From this decree the White Star Mining Company prosecuted an appeal to this court and errors were assigned by both Anderson and Johnson. Upon a consideration of said appeal by this court the decree of the circuit court was in all respects affirmed. See *White Star Mining Co. v. Hultberg*, 220 Ill. 578, where all of the facts in connection with this entire controversy as the same appeared in the record then before this court are stated with great particularity and detail. By reference to page 595 of the majority opinion in that case it will be seen that the grounds upon which the award of the arbitrators was attacked are stated as follows:

“(1) The submission agreement was special, and the arbitrators were bound to decide the controversy on legal and competent evidence only, and according to law, which they failed to do; (2) at the date of the submission the claim for the proceeds of the mine prior to June 17, 1905, contended for, was held and controlled by the Covenant, which had not signed and was not a party to the submission, and such claim was not acquired by Hultberg until September 8, 1903, nearly a month after the submission, and the award, including such proceeds, is void; (3) Anderson was deprived of such an accounting as under the

contract and in fairness and justice he was entitled to, and for this reason the award is vitiated; (4) the award is void and should be set aside because the arbitrators made a gross mistake, and were guilty of such misconduct as amounted, in law, to a fraud, in awarding against Anderson the sum of \$80,000, being the proceeds of the mine in 1902, when it was the property of the White Star Mining Company of California; (5) the arbitrators made a mistake of law in disregarding the settlement between the Covenant and Anderson and the written release executed by the Covenant to Anderson; (6) the bill to enforce the award is a bill for the specific performance of a contract, and the relief thereunder should not be granted for the reason that the award is inequitable and unjust; (7) there was a mistake made by the arbitrators as to the question of the existence of a trust; that Hultberg is estopped; and the award is in violation of the United States constitution, depriving the parties of their property without due process of law; also that the circuit court erred in disposing of the \$6813.75 on deposit with the trust company."

As already indicated, the original bill in the case now before the court is a creditor's bill for the purpose of removing alleged fraudulent conveyances and subjecting certain property to the payment of the decree for \$232,200 against Anderson and for no other purpose. The cross-bill filed by Anderson and others is filed for the purpose of having the decree against Anderson set aside and annulled and all further proceedings for the purpose of enforcing said decree perpetually enjoined. The plaintiffs in error base the right to maintain such cross-bill upon the following propositions: (1) The original decree should be impeached and set aside for the reason that in its rendition, under the circumstances stated, the plaintiffs in error were deprived of constitutional rights under both the State and Federal constitutions; (2) the cross-bill is a bill to impeach the original decree for unjustness and inequity, and

as such is germane to the creditor's bill and should for that reason be entertained and heard; (3) the cross-bill is maintainable as a bill of review for newly discovered evidence; (4) it should be entertained as a bill of review for error apparent upon the face of the record. These several propositions will be considered in the order above stated.

*First*—Plaintiffs in error contend that the decree of the circuit court of Cook county is void and may be impeached by a bill in equity because such decree is wanting in due process of law. Much argument is presented by plaintiffs in error intended to establish the proposition that a judgment of a State court may be void and subject to attack for want of due process of law in the proceedings wherein the judgment was rendered. We entertain no doubt whatever of the soundness of this general proposition. The case of *Pennoyer v. Neff*, 95 U. S. 714, is a case illustrating the application of this principle. There the State court of Oregon rendered a personal judgment against a defendant upon constructive service made in accordance with a local statute. The validity of this judgment was brought into question in the circuit court of the United States for the district of Oregon, and it was held that a personal judgment rendered by a State court upon a money demand against a non-resident of the State who was served by publication of summons but upon whom no personal service of process within the State was made and who did not appear was wanting in due process of law and that no title passed to property sold under execution upon such judgment. This rule need not be further discussed since it can have no application to the present case for the reason that there was complete jurisdiction over the person of Anderson in the proceeding complained of. Plaintiffs in error do not contend that there was a want of jurisdiction of the person of Anderson in the proceeding wherein he was adjudged to pay \$232,200 to Hultberg, but their con-

tention is that there is another class of judgments which may be wanting in due process of law notwithstanding the court rendering such judgment has complete jurisdiction both of the subject matter and of the person of the parties concerned, and that the case at bar belongs to that class. Under the due process clause of the constitution a party is not only entitled to notice of the proceeding against him but he is also entitled to be heard in his defense. Of what avail is it to summon a party into court if after he appears the court arbitrarily refuses to hear him? A judgment pronounced without any judicial determination of the facts which alone can support such judgment is merely the arbitrary edict of the judge, and is as much wanting in due process of law as though the party against whom it is entered had received no legal summons. *Chicago, Burlington and Quincy Railroad Co. v. City of Chicago*, 166 U. S. 226; *Fayerweather v. Rich*, 195 id. 276.

Conceding, as we do, the legal premises upon which the first contention of plaintiffs in error rests, we are still unable to see how it is possible to apply it to the situation presented by this record. In the original proceeding now being attacked plaintiffs in error made certain contentions, which we have set out above, as reasons why the award of the arbitrators should be impeached and set aside. Those several contentions were disposed of by this court mainly upon the ground that they presented questions upon which the parties were foreclosed by the agreement to arbitrate. Plaintiffs in error contend that because this court differed from them as to the grounds upon which the award of the arbitrators could be attacked and disposed of their contentions upon the ground that those contentions were settled by the award and arbitration agreement, they have been deprived of their constitutional rights to have a hearing upon those matters. To this we cannot assent. In the original proceeding the court did not arbitrarily refuse to hear and consider plaintiffs in error's several contentions



but they were all duly considered and disposed of by the court. If the position of plaintiffs in error were sustained and the due process clause of the constitution were held to apply to situations such as we have here, every pleading, whether of plaintiff or defendant, which was erroneously adjudged insufficient, would render any judgment pronounced in pursuance thereof void and open to attack, collaterally or otherwise. Such a rule would be in a large measure destructive of our judicial system by making such judgments absolutely void when heretofore they have been regarded as voidable, only, and subject to reversal in a direct proceeding for that purpose. Reduced to its last analysis, plaintiffs in error's contention on this point is simply a novel and skillful attempt to obtain a rehearing upon questions that have long since passed out of the jurisdiction of the courts.

*Second*—Plaintiffs in error next contend that the original decree was unjust and inequitable, and that, since defendants in error have found it necessary to come into a court of equity by their creditor's bill, the court should entertain a cross-bill for the purpose of re-examining the basis upon which the original decree rests, and if it be found, upon such reconsideration, that the decree is unjust and inequitable for any reason, a court of equity will withhold its aid and enjoin any further attempt to enforce such decree. Upon this proposition plaintiffs in error submit elaborate arguments and cite a great many authorities, both in this State and elsewhere. While we have examined all of the authorities to which reference is made that were accessible to us, we do not deem it necessary to go beyond a few decisions of this court to determine this question. The rule is established by the decisions of this court and elsewhere, that when a bill is filed to carry into execution a former decree that is incomplete or defective to such an extent that it cannot be executed without a further decree curing the defect and making it complete, the court may,

and will, inquire whether the decree is just and equitable. But this rule has no application to decrees that are complete and perfect and free from any inherent defect which prevents their execution. Thus, in *Wadhams v. Gay*, 73 Ill. 415, this court, on page 430, quoted approvingly the following language from 2 Daniells on Chancery Practice, 1614: "It is laid down that although where a decree is capable of being executed by the ordinary process and forms of the court, whatever the iniquity of the decree may be, yet till it is reversed the court is bound to assist it with the utmost process the course of the court will bear. But where the common process of the court will not serve and things come to be in such a state and condition, after a decree made, that it requires an original bill, and a second decree upon that, before the first decree can be executed, if the first decree is unjust, then this court desires to be excused in making it its own act and to build upon such foundation and charging its own conscience with promoting an apparent injustice; and this obliges the court to examine the grounds of the first decree before it makes the same decree again." The doctrine of this case has never been departed from or extended by this court but has been several times re-affirmed. (*Jenkins v. International Bank*, 111 Ill. 462; *Pestel v. Primm*, 109 id. 353; *Lancaster v. Snow*, 184 id. 534.) The decree here sought to be impeached was a complete and perfect decree. It adjudged Anderson to be indebted to Hultberg in the sum of \$232,200 and ordered him to pay the same forthwith and awarded execution. Its completeness and finality are shown by the fact that this court entertained an appeal therefrom and affirmed the same. The necessity for filing the creditor's bill does not arise out of any defect in the decree, but out of alleged acts of Anderson in fraudulently transferring his property to hinder and delay his creditors. The creditor's bill is an original proceeding based on the alleged fraudulent conveyances of Anderson. No case has

been cited, and we have been unable to find any, where, upon the filing of a creditor's bill to set aside fraudulent conveyances subjecting property to the payment of a decree or judgment, the court will again open up the issues that were determined in the original proceeding and re-try them. If such were the rule a judgment debtor could always obtain a rehearing by making a conveyance of his property after the judgment, so as to compel the creditor to file a bill in equity to set aside such conveyance. Thus by his own wrongful act the debtor would secure rights to which he would not otherwise be entitled. This question is not only clear upon reason but is well settled by authority. *Newman v. Willitts*, 60 Ill. 519; *Mattingly v. Nye*, 75 U. S. 370; *Sawyer v. Moyer*, 109 Ill. 461.

*Third*—The cross-bill cannot be sustained as a bill of review for newly discovered evidence, since there is no showing, by affidavit or otherwise, that plaintiffs in error have any newly discovered evidence to present. The claim in this record is, that in the matter of accounting for the profits realized from working the mine the evidence was not fully gone into. There is no affidavit filed with the bill and the bill itself is not sworn to. There is no attempt to comply with the law governing bills of review for newly discovered evidence. *Ricker v. Pile*, 100 U. S. 104; *Schaefer v. Wunderle*, 154 Ill. 577.

*Fourth*—Lastly, plaintiffs in error contend that the cross-bill should be sustained as a bill for review for error apparent upon the face of the decree. A conclusive answer to this contention is, that a bill of review for error apparent upon the face of the record cannot be maintained when the record sought to be reviewed has already been reviewed and the decree affirmed by an appellate tribunal. (*Southard v. Russell*, 16 How. 547; *Putnam v. Clark*, 35 N. J. Eq. 145; *Kingsbury v. Buckner*, 134 U. S. 650; *Schaefer v. Wunderle*, *supra*.) In the *Wunderle* case, on page 583, this court said: "A distinction, however, is

drawn between a bill of review for error apparent upon the face of the decree and one based on newly discovered evidence. The former cannot be filed after the decree has been passed upon by the appellate tribunal." The decree here sought to be attacked, as we have already seen, was reviewed and affirmed by this court. *White Star Mining Co. v. Hultberg, supra.*

There was no error in the order of the court striking the cross-bill from the files, and the decree will be affirmed.

*Decree affirmed.*

HAND and CARTWRIGHT, JJ., dissenting:

We do not agree to the second paragraph of the majority opinion. Plaintiffs in error have never, as yet, had a hearing upon the merits of their case. The original decree upon which the creditor's bill filed in this case is based was affirmed in *White Star Mining Co. v. Hultberg*, 220 Ill. 578, upon the sole ground that the submission was a general one and that the award which followed was binding upon the parties, and from the averments of the cross-bill filed in this case we are impressed with the view that it is shown that the original decree is inequitable and unjust and that it ought not to be enforced by a court of equity, which facts were admitted by the motion to strike the cross-bill from the files. There are numerous authorities which hold that when a complainant is forced to go into a court of equity by original bill and obtain a second decree before the first decree can be executed, if it is made to appear in the second suit that the first decree is inequitable and unjust, the court in which the second bill is filed will examine the grounds upon which the first decree rests, not for the purpose of annulling and setting aside that decree, but for the purpose of advising itself as to the justice of the decree before it makes it its own decree by assisting in its execution. In *Wadhams v. Gay*, 73 Ill. 415, on page 430, it was said: "There is authority for the doctrine that the court may,

on a bill to carry a decree into execution, look into the case to see if it will make the same decree a second time." In such a case, it is said, "it is competent for the court, in respect of the special application, to examine the decree, and if it be unjust, to refuse enforcement.—Adams' Eq. 416." Daniell, in 2 Daniell's Chancery Practice, 1614, citing *Lawrence v. Berney*, 2 Ch. Rep. on this point says: "It is laid down that although where a decree is capable of being executed by the ordinary process and forms of the court, whatever the iniquity of the decree may be, yet till it is reversed the court is bound to assist it with the utmost process the course of the court will bear. But where the common process of the court will not serve and things come to be in such a state and condition, after a decree made, that it requires an original bill, and a second decree upon that, before the first decree can be executed,—if the first decree is unjust,—then this court desires to be excused in making it its own act and to build upon such foundations and charging its own conscience with promoting an apparent injustice; and this obliges the court to examine the grounds of the first decree before it makes the same decree again." And in the earlier case of *O'Connel v. McNamara*, 3 Dr. & Warren, 411, Lord Chancellor Sugden thus announced the rule: "I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right." And in the late case of *Perry v. United States School Furniture Co.* 232 Ill. 101, which was a creditor's bill, this court enforced the rule and declined to assist in carrying into execution a judgment at law by reason of the fact that the contract which was the basis of the judgment was in violation of the anti-trust statute and contrary to public policy. On page 109 of the opinion the court said: "There can be no

question that the judgment was a valid and binding judgment against the United States company, and that as against it Loughlin had a right to pursue his remedy at law to secure its payment and satisfaction, but a court of equity will not lend its aid in the enforcement of claims or rights which arise out of contracts that are contrary to the public policy of the State." In *Teel v. Dunniho*, 230 Ill. 476, it was held, upon an original bill to carry into execution a former decree, the court will look into the original case and see whether the decree is equitable and just before it will decree its enforcement; and there are numerous other cases which have been decided by this court where the doctrine of the foregoing cases has been recognized. (*Higgins v. Curtiss*, 82 Ill. 28; *Pestel v. Primm*, 109 id. 353; *Lancaster v. Snow*, 184 id. 534.) In the last case, on page 537, it was said: "Since the opinion was filed in *Wadhams v. Gay*, 73 Ill. 415, the rule has been in this State that where an original bill is filed asking for a decree to carry a former decree into execution, the court may look into the original case and see if the former decree is equitable and just, and if it is not, may refuse to enter a decree to enforce and carry it out."

The foundation of the doctrine announced in the foregoing cases is, that a court of conscience will not lend its assistance to the consummation of a wrong by carrying into effect an inequitable and unjust decree. This is an equitable doctrine and does not apply to the enforcement of judgments at law, although it was applied to a judgment at law in *Perry v. United States School Furniture Co. supra*, where a question of public policy was involved. The cases cited in the majority opinion which hold that upon a creditor's bill the court will not inquire into the validity of the judgment which forms the basis of such bill are not in point. We are of the opinion that, if the facts averred in the cross-bill are established by proof, while a court of equity should not enjoin the execution of

the original decree it ought not to enforce that decree, but should leave the defendants in error to enforce said decree as best they may by the ordinary processes of the court.

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DAVID M. SWAIN & SON, Appellants, *vs.* THE CHICAGO, BURLINGTON AND QUINCY RAILROAD Co. Appellee.

*Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.*

1. **NUISANCES**—*obstruction of a navigable stream is a public nuisance.* The obstruction of a navigable stream so as to interfere with the free enjoyment of the public easement therein is a public nuisance, and any person who erects or maintains such obstruction may be proceeded against by indictment or information.

2. **SAME**—*what essential to enable a private person to recover damages from public nuisance.* The gist of an action by an individual for damages from a public nuisance is the private injury to him, and he must allege and prove some special damage different in kind, and not merely in degree or extent, from the damages sustained by the general public.

3. **SAME**—*test in determining whether individual sustains special damage.* The test in determining whether the damage sustained by an individual from a public nuisance is special is whether the injury complained of is a violation of an individual right of the complaining party or is merely a hindrance to him in the enjoyment of a right enjoyed in common with every other person.

4. **SAME**—*when a declaration does not show a special injury to plaintiff.* A declaration in an action by a steamboat owner against a railroad company for damages to plaintiff's business due to the obstruction of a navigable river by defendant's bridge, does not show a special damage where it appears therefrom that the bridge was constructed long before the plaintiff desired to navigate the river, and it is not shown that the plaintiff has any riparian rights that are interfered with, or any other right except the right, possessed in common with every other person, to navigate the river.

FARMER and COOKE, JJ., dissenting.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

SUCHER, McNEMAR & MOORE, for appellants.

JACK, IRWIN, JACK & MILES, (CHESTER M. DAWES, and J. A. CONNELL, of counsel,) for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court :

David M. Swain & Son filed a declaration in the Peoria circuit court against the Chicago, Burlington and Quincy Railroad Company to recover damages from the defendant for maintaining a railroad bridge across the Illinois river at LaSalle, alleging that said bridge was an obstruction to the plaintiffs' steamboats which they were operating between Peoria and Ottawa for the carriage of both passengers and freight, whereby the plaintiffs were damaged in the loss of divers profits which they would otherwise have made. To the amended declaration, which contained five counts and three additional counts, the defendant interposed demurrers, both general and special, which were sustained, and the plaintiffs having elected to abide by their declaration, the court rendered judgment against them for costs. This judgment was affirmed by the Appellate Court for the Second District. The case comes to this court on a certificate of importance given by the judges of the Appellate Court.

The only question involved is whether the court erred in sustaining the demurrers to the declaration.

All of the counts contained the following averments: That on September 3, 1909, and for more than five years prior thereto, the plaintiffs owned and possessed a line of steamboats used during all said time to carry passengers and freight for hire on the Illinois river between the city of Peoria and various cities and towns along said river, and to points on said river beyond the city of LaSalle as far as the city of Ottawa; that said river, during all said time, was, as far up said river as the city of Ottawa, a navigable stream leading into the Mississippi river, and as such a pub-



lic highway free to the plaintiffs to use steamboats thereon between the cities of Peoria and Ottawa, except for the obstruction of said river by the defendant; that on September 3, 1909, and for more than five years prior thereto, the defendant was possessed of, using and maintaining a certain railroad bridge across the said river near the city of LaSalle; that defendant, prior to September 3, 1904, was notified that plaintiffs were engaged in the business aforesaid, and that defendant's bridge obstructed the free navigation of said river and injured and damaged plaintiffs' business of carrying passengers and freight between Peoria and Ottawa; that it was the duty of defendant to so maintain said bridge as not to obstruct the free navigation of said river, but the defendant, not regarding its duty, did during all said time unlawfully maintain said bridge too low above the water of the river to permit plaintiffs' steamboats to pass under said bridge to points of destination above and beyond said bridge, whereby plaintiffs, during all said time, were compelled to unload below said bridge their passengers and freight destined to points on the river above said bridge, and were compelled to expend large sums of money in unloading and transferring passengers and freight from below said bridge to their destination above said bridge and in transporting passengers and freight from points above said bridge to below said bridge, and thereby plaintiffs were deprived of great gains and profits that they would otherwise have acquired, and were otherwise injured and damaged in and about their business of carrying passengers and freight. The fourth and fifth counts aver that for many years prior to September, 1904, the river was navigable for steamboats from Peoria to Ottawa, and that notice was given to the defendant frequently during the time for which damages are claimed. The three additional counts aver that the bridge was built in 1887, and that the river was before the construction of the bridge, and still is, a navigable stream, and that the bridge was unlawfully

built without any draw and too low, and that the defendant took possession of and began to use said bridge prior to September 3, 1904. The fifth count charged the defendant with a violation of the statute by maintaining its bridge in such a manner as unnecessarily to impair the usefulness of the river. The second count charged a violation of the statute by failure to restore the stream to its former state. The third count charged a violation of the statute by preventing the navigation of the river during the five years next preceding the commencement of the suit. There is no averment in any of the counts that plaintiffs had any established business on the river and were engaged in transportation above or below the place of the bridge at the time of its construction, nor is there any averment in any of the counts that the plaintiffs had any riparian property rights, either above or below said bridge, which were interfered with by its construction or maintenance.

The substance of the amended declaration is, that the defendant's bridge at LaSalle obstructs the navigation of the Illinois river by plaintiffs' steamboats and has done so for the five years last past; that the Illinois river is now, and has been during the five years last past, a navigable stream; that the plaintiffs desired to navigate the river between LaSalle and Ottawa with their steamboats and have been prevented from doing so by the obstruction complained of, whereby damages have been sustained by the plaintiffs in the loss of profits which might otherwise have been made by the use of their steamboats in carrying passengers and freight to and from points on the Illinois river above the bridge.

In the view we have of this case it will only be necessary to consider one fatal defect in appellants' declaration.

An obstruction of a navigable stream so as to interfere with the free enjoyment of the public easement therein is a public nuisance both under the common law and the statutes of this State. (Gould on Waters, sec. 21; Crim.

Code, sec. 221.) Any person who erects or maintains such obstruction may be proceeded against by indictment or by information filed by the Attorney General to abate such nuisance. A public nuisance may also so injure an individual as to justify him in maintaining an action. Where the proceedings are instituted by a private individual for an injury from a public nuisance the gist of his action is the private injury, and he must allege and prove some special damage different in kind from that suffered by the general public. (*McDonald v. English*, 85 Ill. 232; *City of Chicago v. Union Building Ass'n*, 102 id. 379; *City of East St. Louis v. O'Flynn*, 119 id. 200; *Smith v. McDowell*, 148 id. 51; *Chicago General Railway Co. v. Chicago, Burlington and Quincy Railroad Co.* 181 id. 605.) In the discussion of this rule counsel on both sides have seen fit to examine and cite a large number of authorities from England and from the various States of the Union. The briefs are very instructive, and if the question here were one of first impression in this court the discussion would be very useful in aiding the court to determine what rule should be followed, but since this court has in the cases above cited settled the general proposition that an individual cannot maintain an action for an injury resulting from a public nuisance without alleging and proving special and peculiar damages, differing in kind, and not merely in degree or extent, from those which the general public sustain, we have no occasion to discuss this question in the light of authorities from other jurisdictions. The rule of law is clear enough, and the only remaining question is whether appellants have alleged such special injury resulting from the maintenance of the bridge in question as the law requires.

It is sometimes a matter not entirely free from difficulty to determine what is and what is not such special injury as will support an action by an individual. The true test seems to be whether the injury complained of is the viola-

tion of an individual right or merely a hindrance to the plaintiff in the enjoyment of the public right. It is common usage to speak of one's right to travel upon a public highway or of his right to use a navigable stream, but it seems to us that it is not quite accurate to call a privilege which one enjoys in common with every other person a personal right; but whether the conception be expressed, as it most commonly is, by calling it a right or privilege or liberty,—which seems more nearly to express the true legal idea,—it is certain that the so-called right of everyone stands upon an exact equality. If a trench be dug across a public street, every person in the community who has occasion to use the street will be delayed and inconvenienced. The loss of time in going around such obstruction would be common to all who used such highway. One person might be delayed only a few seconds, while another, traveling by a different mode of conveyance, might be delayed much longer, and the nature of the business being done might be such that in one case the damage would be nominal while in another it might be considerable, but in all these cases the damages would differ only in degree and not in kind; but if another person, in attempting to use the highway in the exercise of reasonable care, falls into the trench and receives a personal injury, or if his horse should fall into the ditch and receive an injury, clearly an action would lie for the special damage to his person or his property. In the illustration which we have given it will be noted that in the case where the injury was loss of time, business engagements, and the like, there is merely an injury to the public right to use the street, while in the second case the injury to the person and property is a direct trespass upon the individual and invades his personal and individual rights. It will be found upon a careful examination of the cases which sustain the right of an individual to maintain an action for an injury from a public nuisance, that there is some special and particular injury either to

his personal property or established business, and that the recovery is sustained on the ground that his personal and individual rights, other than his right to use the highway, have been invaded.

The case of *Viebahn v. Crow Wing County Comrs.* 3 L. R. A. (N. S.) 1126, which is much relied upon by appellants, is not an exception to the above rule. In that case the plaintiffs had an established business and were engaged in operating a line of steamboats on the Mississippi river, a navigable stream, carrying passengers and freight for hire and towing small craft from point to point on the river. The defendant wrongfully and without authority of law constructed a bridge over the river, thereby preventing the plaintiffs from continuing to prosecute their established business. It was determined by the Supreme Court of Minnesota that an action would lie to redress the special damage sustained by the plaintiffs. The case lays stress on the fact that the plaintiffs had an established business. Regarding such established business as a property right belonging to the plaintiffs, which was injured by the wrong of the defendant, the case is no exception to the general rule requiring proof of a special, peculiar injury, different in kind from that sustained by the public at large.

The case of *Smart v. Aroostook Lumber Co.* 14 L. R. A. (N. S.) 1083, is a case decided by the Supreme Court of Maine which appellants rely on. There the plaintiff owned a summer residence built on the bank of a navigable stream. The defendant lumber company obstructed the said stream with logs, so that the plaintiff was unable to use his private right of easement of getting into and out of his premises. The case shows that the stream was the only means of ingress to and egress from plaintiff's house, and when that was obstructed he suffered a special and peculiar injury in the enjoyment of his property right in his home. This and other like cases where there was present some circumstance of particular injury, differing in kind, and not merely in

degree, from the injury suffered by the public at large, do not help appellants' case. There is no averment in appellants' declaration of any special and peculiar injury differing in kind from that which every person who might seek to navigate the Illinois river would suffer. It may be that appellants' injury is greater than that of other members of the public because of the desire to make more extensive use of the river than others. There would be a difference in the amount of inconvenience between the man who had one boat and another who owned a dozen boats, but the injury would be of the same general character. It is not the amount of injury that will sustain the individual action but the character of it. Appellants show by their declaration that the bridge in question was erected many years before they engaged in the navigation of the Illinois river. They therefore have not even the injury to an established business to rest their case upon. It is not shown that they have any rights as riparian owners, such as existed in the Maine case above cited. In short, there is nothing shown by the declaration, or any of the counts thereof, in the nature of a special, particular injury to appellants. It is manifest from the averments of the declaration that appellants are seeking to recover damages because they have been hindered and delayed in the exercise of a right or privilege of a purely public nature, and that there is no element of personal or individual injury to a private right shown by the declaration. The declaration was therefore fatally defective and there was no error in sustaining the demurrers thereto.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

FARMER and COOKE, JJ., dissenting.

CONSTANTINE MUELLER, Defendant in Error, *vs.* ANNA  
M. PHELPS, EXRX., Plaintiff in Error.

*Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.*

1. NEGLIGENCE—*duty of a landlord with reference to elevator used by his tenants.* A landlord who rents different parts of his building to various tenants, reserving the elevator, halls, stairways or other approaches for the common use of his tenants, is under an implied duty to keep such places in a reasonably safe condition and is liable to persons lawfully in the building for injuries resulting from a failure to perform such duty.

2. SAME—*rule as to sufficiency of a declaration after verdict.* After verdict everything will be presumed which by reasonable intendment may be inferred from the general averments of a declaration, the sufficiency of which was not questioned by demurrer.

3. SAME—*doctrine of assumed risk does not apply where there is no contractual relation.* Where an employee of a tenant in a building is injured as the result of the landlord's alleged failure to perform his duty to see that the elevator used by his tenants was reasonably safe the doctrine of assumed risk does not apply, as there is no contractual relation between the landlord and such employee.

4. SAME—*contributory negligence is ordinarily a question for the jury.* The question of contributory negligence is ordinarily one for the jury, and becomes one of law for the court only when the undisputed evidence is so conclusive that it is clear the injury resulted from the negligence of the party injured and could have been avoided by the use of reasonable care.

5. SAME—*what cannot be said to be contributory negligence as a matter of law.* That the plaintiff, desiring to use the elevator on business of his employer, raised the door of the elevator shaft and stuck his head in to see where the elevator was does not amount to contributory negligence as a matter of law, where the evidence shows that such course was the only one available to ascertain the position of the elevator, which had no regular operator but was operated by the tenants as they desired to use it.

6. INSTRUCTIONS—*when a modification of an instruction is not harmful.* Modifying an instruction for the defendant in a personal injury case by striking out a sentence designed to advise the jury that the doctrine of *res ipsa loquitur* does not apply is not harmful, where other of the defendant's given instructions clearly show that such doctrine could not be invoked.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding.

F. J. CANTY, and J. C. M. CLOW, for plaintiff in error.

ADLER & LEDERER, for defendant in error.

MR. CHIEF JUSTICE CARTER delivered the opinion of the court:

Defendant in error brought an action on the case in the superior court of Cook county for personal injuries. On the trial the court directed a verdict in favor of Henry Jacobs, one of the defendants, and the case proceeded against Erskine M. Phelps, the other defendant, resulting in a verdict and judgment for \$4500 in favor of defendant in error. The Appellate Court affirmed the judgment on appeal, and the case was brought to this court by petition for *certiorari*. Pending the appeal in the Appellate Court Phelps died and his executrix was substituted as a party to the suit.

The case was tried on the first and second counts of the declaration. The first alleged that Phelps, on August 17, 1906, was the owner of the premises 48 and 50 Wabash avenue, in Chicago; that Henry Jacobs conducted a restaurant on the main floor and employed defendant in error as a cook; that it was one of Mueller's duties to haul material to and from the basement to said restaurant by means of an elevator; that the defendants neglected to fulfill their duties in keeping the elevator shaft and appurtenances in good condition and repair, and that by reason of the defective condition, while plaintiff was in the exercise of due care, he was struck by the elevator, thrown to the ground and injured. The second count stated the same accident, and alleged the negligence of the defendants to be that they failed to keep the elevator in good condition and repair and



provide sufficient light and appliances in said elevator and shaft. The general issue was pleaded. It was stipulated that Phelps, at the time of the accident, owned the premises in question.

The evidence showed that the elevator was used for carrying freight between the five stories and basement of the building and was used in common by the tenants of the building. The private secretary of Phelps testified that it was a part of his duties to inspect the building at intervals, and on such occasions he would examine the elevator to see that it was in good running order. Defendant in error was employed as chief cook by Jacobs, a tenant, who ran a restaurant on the main floor. The elevator was about seven or eight feet square. The shaft where it passed through the kitchen was enclosed in solid walls, having an iron door five or six feet wide, which opened into it from the kitchen. Defendant in error testified that on the occasion in question he desired to use the elevator to go down to the basement to look over some kitchen supplies. He raised the door, put his head into the shaft and called, "Elevator there?" and almost immediately was struck on the head by the descending elevator, which was in use by one of the other tenants, knocked to the basement floor and his leg broken and other injuries inflicted, so that he was incapacitated for several months. There is some evidence tending to show that his limb was injured permanently. There were lights in the kitchen but none in the elevator shaft. Evidence on the part of defendant in error was to the effect that it was almost "pitch dark" on the inside of the shaft and he could see nothing. There was evidence in behalf of plaintiff in error to the effect that there was sufficient daylight in the shaft so that the elevator could be seen when still at a considerable distance above the floor without putting one's head entirely into the shaft. There was no regular operator and the employees of each tenant ran the elevator when they desired to use it. The evidence all tended to

show that to use the elevator it was necessary to raise the door and look into the shaft to find what floor it was at and to ascertain if it was already in use by another tenant. The elevator was operated by a rope, pulled up or down, as desired.

It is first contended that the declaration does not set out a cause of action against the plaintiff in error; that it does not state sufficient facts from which the law will presume a duty resting upon Phelps, the non-performance of which resulted in the injury complained of. The law is settled in this State that a landlord who rents different parts of his building to various tenants, reserving the elevators, halls, stairways or other approaches for the common use of his tenants, is under an implied duty to keep such spaces in a reasonably safe condition, and is liable for injuries to persons lawfully in the building, resulting from a failure to perform that duty. (*Shoninger Co. v. Mann*, 219 Ill. 242.) The declaration charged that the elevator and the shaft were permitted to remain in such a defective condition as to cause the accident; that they were dark and without sufficient appliances, and therefore dangerous. The sufficiency of the declaration is not raised here by demurrer. After verdict, everything which by reasonable intendment may be inferred from the general averments of the declaration will be presumed. (*O'Rourke v. Sproul*, 241 Ill. 576; *Diamond Glue Co. v. Wietzychowski*, 227 id. 338.) We think the declaration states sufficient facts so that after verdict the law will presume the duties resting upon plaintiff in error, the breach of which caused the injury.

It is further urged that there can be no recovery here, on account of the contributory negligence of the defendant in error. This question was properly raised by peremptory instructions. Counsel for plaintiff in error do not claim that the doctrine of assumed risk applies. The argument, however, urged in support of contributory negligence is, substantially, that defendant in error knew and appreciated

the danger of using the elevator. This is practically seeking to apply the doctrine of assumed risk under another name. The doctrine of assumed risk cannot apply here, as there was no contractual relation between defendant in error and plaintiff in error. (*Shoninger Co. v. Mann, supra*; *O'Rourke v. Sproul, supra*.) The question of contributory negligence is usually a question for the jury. It only becomes one of law for this court when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution. (*Beidler v. Branshaw*, 200 Ill. 425.) Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question of contributory negligence is for the jury. (*Illinois Central Railroad Co. v. Anderson*, 184 Ill. 294; 1 Thornton on Negligence, 100.) On the record in this case we think it was a question of fact to be submitted to the jury whether defendant in error was exercising ordinary care at the time of the accident. *Devine v. National Safe Deposit Co.* 240 Ill. 369; *Hamilton v. Taylor*, 80 N. E. Rep. (Mass.) 592.

It is further urged that the trial court committed error in permitting evidence to be introduced as to the manner in which certain witnesses used the elevator. The general manner in which it was necessary to use the elevator was admitted in evidence without objection or exception. What certain individuals did when running the elevator of course would not tend to prove whether or not defendant in error was using it with such negligence as to preclude recovery. Defendant in error's witness who was asked how he ran the elevator did not answer the question. The cross-examination of plaintiff in error's witness on this subject, whose testimony is objected to, was fairly based on the evidence brought out by counsel for plaintiff in error.

It is further insisted that the court committed error in modifying one of the instructions for plaintiff in error by striking out the words, "the mere fact that the plaintiff has been injured is to have no bearing whatsoever upon the question of whether or not the defendant Phelps is liable." The only legal purpose in having this part of the instruction given would be to tell the jury that the doctrine of *res ipsa loquitur* did not apply. Other instructions given for plaintiff in error clearly showed that this doctrine could not be invoked by defendant in error in this case. As the instructions must be read as a series, (*Springfield Consolidated Railway Co. v. Punttenney*, 200 Ill. 9,) the plaintiff in error could not have been injured by striking these words from the instruction.

We find no reversible error in the record. The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*



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